



CML 614W DISSERTATION

**THE INDUSTRIAL COURT IN  
BOTSWANA: AN ASSESSMENT OF  
ITS CONTRIBUTION TO LABOUR  
RELATIONS**

BY

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I, Kgomoetso Pearl Kupe-Kalonda, do hereby declare that the dissertation entitled 'The Industrial Court: An Assessment of its Contribution to Labour Relations in Botswana' is my own unaided work except where otherwise acknowledged.

I further declare that this work has not been submitted in the past, nor is it being submitted for a degree in any university other than the University of Cape Town.

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## DEDICATION

I dedicate this work to all the members of my family who have sacrificed and endured many inconveniences and hardships during my prolonged absence.

In particular, I dedicate this work to my mother and best friend, Professor Serara Selelo-Kupe, an exceptional academic, pioneer, activist, and woman extraordinaire. You have been my motivation and inspiration over the years.

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UNIVERSITY OF CAPE TOWN

Abstract

THE INDUSTRIAL COURT: AN  
ASSESSMENT OF ITS  
CONTRIBUTION TO  
INDUSTRIAL RELATIONS IN  
BOTSWANA

PEARL KUPE-KALONDA

An effective and practical dispute settlement machinery which deals with disputes between workers and employers is fundamental to achieving sound labour relations and industrial peace and harmony. The ideal dispute settlement machinery should not only be founded on tenets of industrial democracy, but should also allow the active participation of the parties.<sup>1</sup>

In many countries dispute resolution is dominated by the State through the conciliation and mediation services provided by the Ministry of Labour.<sup>2</sup> This fact was readily acknowledged by the former Minister of Labour and Home Affairs (Botswana), P Balopi, who stated the following:

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<sup>1</sup> Bendix S *Industrial Relations in South Africa*, 2<sup>nd</sup> ed, Juta & Co. (1992), p129

<sup>2</sup> Christie S. & Madhuku L. *Labour Dispute Resolution in Southern Africa* 1<sup>st</sup> ed., Friedrich Ebert Stiftung & the Institute of Development and Labour Law, University of Cape Town, p 7

- "Our policy in the past has been to intervene administratively in disputes through the offices of the Commissioner of Labour."<sup>3</sup>

The Minister further acknowledged the inadequacy of the existing labour legislation and dispute settlement machinery in Botswana by stating the following:

- "Although the Trade Disputes Act does provide for arbitration and conciliation, the legislation has not become a central institution in the settlement of disputes, and both employers and workers inevitably continue to turn to Government. A similar problem exists when it comes to individual grievances and in particular the very emotional issue of dismissals. As with collective disputes, there is a danger of.....the settlement of a grievance being dependant upon access to the corridors of Government.

I am strongly of the view that Government cannot continue to play this role and as in collective disputes, the time has come to establish independent institutions, free of Government, to which both employees and employers can turn to if they are unable to settle their differences internally."<sup>4</sup>

The Ministers speech reflected a major change in government policy with regard to the handling of labour disputes. One of the primary

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<sup>3</sup> Balopi P.K, *Opening Speech by the Minister of Labour & Home Affairs*, Seminar on the Revision of the Employment Act & Trade Disputes Act, Gaborone Sun, August 27, 1990 at 4

<sup>4</sup> Ibid at 4

consequences of this change was the establishment of the Industrial Court through section 17 of the Trade Disputes (Amendment) Act of 1992.<sup>5</sup> The Court was primarily established to resolve disputes that could not be settled by government machinery.

The study briefly outlines the development of labour relations in Botswana with specific emphasis on developments leading to the establishment of the Industrial Court. Various provisions of the Trade Disputes (Amendment) Act 1992 pertaining to the Industrial Court are set out. The study continues to review the nature and functions of the Industrial Court.

The study also looks at the Industrial Court process and assesses it in terms of the established principles pertaining to an efficient dispute resolution system.

Since its inception the Industrial Court has dealt with a number of cases and has contributed significantly to the development of labour law and labour relations in Botswana. The study examines some of the major decisions of the Industrial Court with a view to identifying any significant principles and/or trends. Certain attitudes and perceptions have been expressed regarding the Courts' role and function in labour relations. Criticisms specifically raised include a concern over the Industrial Court's apparent lack of jurisdiction and status amongst other things. The study critically examines these perceptions and attitudes by way of standardized questionnaires.

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<sup>5</sup> Section 17, *Trade Disputes (Amendment) Act, 1992*



The study aims to assess the abovementioned in light of the Industrial Court's role in the changing labour relations environment in Botswana.

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## LIST OF ABBREVIATIONS

<b>ACAS</b>	Advisory, Conciliation & Arbitration Service (UK)
<b>ADR</b>	Alternative Dispute Resolution
<b>BCL</b>	Botswana Copper Limited
<b>BDVC</b>	Botswana Diamond Valuing Company
<b>BFTU</b>	Botswana Federation of Trade Unions
<b>BOBEU</b>	Botswana Bank Employees Union
<b>BOCCIM</b>	Botswana Confederation of Commerce, Industry & Manpower
<b>BPC</b>	Botswana Power Corporation
<b>BMWU</b>	Botswana Mine Workers Union
<b>CCMA</b>	Commission for Conciliation, Mediation & Arbitration (SA)
<b>IC</b>	Industrial Court (Botswana)
<b>ILJ</b>	Industrial Law Journal
<b>ILO</b>	International Labour Organisation
<b>IMSSA</b>	Independent Mediation Services of South Africa
<b>IRC</b>	Industrial Relations Court (Malawi)

<b>LRA</b>	Labour Relations Act (South Africa)
<b>MAWU</b>	Metal & Allied Workers Union
<b>NALCGPWU</b>	National Amalgamated Local & Central Government and Parastatal Manual Workers' Union
<b>SA</b>	South Africa
<b>SADC</b>	Southern African Development Community
<b>SALLR</b>	South African Labour Law Reports
<b>TDA</b>	Trade Disputes Act (Botswana)
<b>SSI</b>	Schedule Standardized Interview

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*Ben K. & Another v Green Industrial Enterprises Corporation (Botswana) (Pty) Ltd.* IC 20/95

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*Moyo S. v Kgolagano College* IC 33/95

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Trade Unions Act No. 24 of 1969

Trade Disputes Act No. 28 of 1969

Trade Disputes Act No. 29 of 1982

Trade Unions & Employers Act Organisations Act of 1983

Trade Disputes (Amendment) Act No. 23 of 1992

Trade Disputes (Amendment) Act No. 26 of 1992

Trade Disputes (Amendment) Act No. 18 of 1995

Trade Disputes (Amendment) Act No. 14 of 1997

Trade Disputes (Amendment) Act No. 22 of 1997

Trade Disputes (Amendment) Act No. 24 of 1998

## SOUTH AFRICA

Constitution of South Africa, Act No. 108 of 1996

Labour Relations Act No. 28 of 1956

Labour Relations Act No. 66 of 1995

## MALAWI

Constitution of the Republic of Malawi

Labour Relations Act No. 16 of 1996

## NEW ZEALAND

New Zealand Employment Contracts Act of 1971

## APPENDICES

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APPENDIX C	Industrial Court Rules
APPENDIX D	Industrial Court Documentation

## **CHAPTER ONE**

### **OBJECTIVES, METHODOLOGY & LIMITATIONS OF THE STUDY**

#### **1. Objective of the study**

The broad objective of the study is to assess the contribution of the Industrial Court of Botswana to the development of industrial relations in Botswana. The nature of the approach is predominantly historical.

#### **1.1 Chapter One**

The objective of this chapter is to set out the objective, methodology of research and limitations of the study

#### **1.2 Chapter Two**

The objective of this chapter is to establish the need for specialized Labour Courts. The chapter commences with a brief outline of the historical development of specialized Labour Courts as they first existed in Europe and concludes with a brief exposition on some of the pertinent philosophies surrounding Labour Courts.

#### **1.3 Chapter Three**

To be able to effectively assess the contribution of the Industrial Court to labour relations in Botswana, it is necessary to set out a historical perspective of developments in the labour relations field. Chapter Three outlines the industrial



law as it existed prior to the 1992 reforms and sets out the legislative background which led to the establishment of the Industrial Court. It looks at the efficacy of the industrial law as it existed and briefly highlights the shortcomings of the previous dispute resolution machinery. The framework of approach is historical and is used to illustrate how the Industrial Court came into existence.

#### 1.4 Chapter Four

The objective of this chapter is to set out the nature and composition of the Industrial Court. Chapter four outlines the actual establishment of the Court and reviews its nature and functions with particular emphasis on its jurisdiction and powers. The chapter also describes the Courts procedures as set out in the Trade Disputes (Amendment) Act and the Industrial Court Rules. The chapter concludes with a brief discussion relating to the nature and procedure of appeals and reviews emanating from the Industrial Court.

#### 1.5 Chapter Five

The objective of this chapter is to specifically examine the procedures and processes of the Botswana Industrial Court and evaluate them against the international 'best practice' benchmarks of an effective dispute resolution system. The chapter examines the accessibility, speed and formality of the Court in detail. The Court is primarily evaluated against the South African dispute resolution system which is considered to be the most progressive and effective within the SADC region.

#### 1.6 Chapter Six

The objective of this chapter is to review the case law emanating from the Industrial Court. Chapter six examines and analyses certain decisions of the Court

with a view to identifying any significant features or trends. The chapter aims to assess the overall contribution of the Court to the development of industrial relations in Botswana, through its body of case law. The facts of each case are briefly set out, followed by a general commentary and analysis. The chapter concludes with some general comments relating to the Industrial Courts role in the development of a body of coherent case law.

### 1.7 Chapter Seven

The objective of this chapter is to set out the perceptions prevailing amongst labour academics, management personnel, trade unionists and labour lawyers regarding the key and controversial issues that relate to the role of the Industrial Court in labour relations in Botswana. The format of the interview is clearly set out. Each question is followed by a response of the interviewees within each grouping. The chapter concludes with an overall evaluation of the interviewees' perceptions.

### 1.8 Chapter Eight

Chapter eight concludes with an assessment of the Industrial Courts contribution to labour relations in Botswana. In assessing the contribution of the Industrial Court to labour relations, it considers some of the best practice benchmarks of an efficient dispute resolution system and incorporates the interviewees' perceptions of the Court. The chapter sets out the main findings of the study and concludes by suggesting possible area for future research.

## 2. METHODOLOGY

A qualitative approach will be employed in conducting research since the study does not lend itself to a statistical or quantitative approach. Documentary analysis

will be the primary method adopted. Data such as Government reports, Acts of Parliament, draft bills, law reports, speeches and policy documents, historical books and documents will be analyzed. Various Court decisions, conference reports, workshop documents, journal articles and books on labour law will also be included. These documents will be used largely to provide a historical framework.

## 2.1 Chapter One

No specific methodology will be employed in this chapter other than setting out the objectives, methodology and limitations of the study.

## 2.2 Chapter Two

Labour law textbooks and journal articles were used in Chapter two to provide a historical background and framework..

## 2.3-2.5 Chapters Three, Four, Five & Six

Chapters three, four, five and six will be based primarily on the analysis of primary and secondary materials in the form of Acts of Parliament and draft bills, court cases, speeches and policy documents as well as textbooks, seminar and conference papers and research reports.

## 2.6 Chapter Six

In addition to the above, chapter six also focuses on analyzing certain decisions of the Court. The decisions analyzed were selected on the basis of their;

- contribution to fair employment guidelines and practices

- impact on the previous common law approach to the employment relationship

## 2.7 Chapter Seven

Due to time limitations, discussion interviews were held using the purposive sampling method. Discussion interviews were also the preferred method for reason of eliciting precise and exact responses.

### Construction of the Interview Schedule

Prior to interviewing the persons listed in Appendix A,<sup>1</sup> a certain amount of literary review was conducted to identify issues and controversies surrounding the functions and procedures of the Industrial Court. An interview schedule was accordingly constructed with open-ended questions to guide the researcher and facilitate the flow of the interview.<sup>2</sup> The questions were chosen in relation to certain areas of concern impacting on the Industrial Courts contribution to labour relations in Botswana. The said areas are set out hereunder:

- Industrial Court Procedures
- Industrial Courts Jurisdiction and Status
- Status of the Industrial Court
- Collective Bargaining Process
- Usage of the Court

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<sup>1</sup> See page 1 for the list of interviewees

<sup>2</sup> See Chapter Eight, page for the full layout of the interview schedule

- Impact of the Industrial Court
- Attitudes towards the Court
- Positive/Negative aspects of the Court

#### Structure of the Interview Schedule

The 'schedule standardized interview', otherwise known as SSI, was used.<sup>3</sup> The wording and structure of the questions is identical for each respondent. The purpose of 'standardization' is to ensure that any variations that occur, are attributable to the actual differences in response and not to the instrument employed.<sup>4</sup>

#### Choice of Interviewees

Denzin advocates for the *investigator* approach in selecting appropriate person for interview.<sup>5</sup> The approach proposes that interviewees be selected on the basis of their exposure to a 'particular set of events or experience'. Consequently interviewees were selected on the basis of;

- their expertise, knowledge and general involvement in labour relations in Botswana;
- their involvement in the Industrial Court of Botswana;

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<sup>3</sup> Denzin, N.K., *The Research Act*, Mc-Graw-Hil Book Company, New York, 1978, p59

<sup>4</sup> Denzin, op. cit., at p60

<sup>5</sup> Ibid at p158

- their written or verbal statements and/or articles on the Industrial Court

## 2.8 Chapter Eight

A critical assessment of the Industrial Court's contribution to labour relations is conducted along with a summary/setting out of main findings.

### 3. Limitations of the study

The study should be examined and evaluated in light of the following considerations;

- The study is intended to be exploratory in nature;
- The small size of interviewees and style of selection is restrictive in that;
  - (i) the opinions expressed are not necessarily representative of the population; and
  - (ii) no real significant statistical measurements could be gleaned.
- The limited number of cases evaluated may not be a true reflection of the Industrial Courts 'thinking';

- The opinions expressed by the interviewees in Chapter Seven are subject to the writers' personal interpretation;
- The use of the comparative is limited due to time and word restrictions.

#### 4. Conclusion

In spite of the paucity of material written on the Industrial Court of Botswana, and the abovementioned limitations of the study, the study reflects a reasonable assessment of pertinent issues, controversies and attitudes relating to the Botswana Industrial Court.

## **Chapter Two: The History of Labour Courts**

### **1. The Historical development of Labour Courts**

France was the forerunner with regard to the establishment of specialized labour courts. The first labour court, the *conseil de prud' hommes* (literally the court of wise men), was set up in Lyons by virtue of a Napoleonic law passed in 1806.<sup>1</sup> The Court was predominantly made up of manufacturers and foremen and initially existed as a disciplinary committee.<sup>2</sup> The *conseil* initially dealt with disputes concerning the quality of work and the rate of payment, but this was later extended to provide for conciliation to minor disputes.<sup>3</sup> In the second stage of its development, from 1880 onwards, the *conseil* underwent some fundamental transformation regarding the way in which labour disputes were resolved.<sup>4</sup> This was largely due to the considerable interest of the workers' movement in the system. The workers' movement, accordingly, worked towards obtaining an 'improved functioning' of the court as well as a geographical and professional extension of the system. The establishment of the *conseil* in France culminated in the 1924 *Code du Travail* (Work Code) legislation.<sup>5</sup>

The French model was followed by Belgium in the late 1880's, with Italy following suit in 1893 and passing the industrial *provviri*.<sup>6</sup> In Italy the concept of *magistratura non togata* (gownless courts) was introduced alongside the *magistratura*

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<sup>1</sup> Ramm Thilo, *Workers Participation: the Representation of Labour & Special Labour Courts*, in Anstey M., (ed) *Employee Participation & Workplace Forums*, Juta (1997) p 270

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ramm Thilo, op. cit., p 271

<sup>5</sup> Ramm Thilo, op. cit., p 272

<sup>6</sup> Ramm Thilo, op. cit., p 270



*ordinaria* (ordinary courts).<sup>7</sup> In Germany specialised courts were first introduced for manual workers in 1890 and later for clerical workers in 1904.<sup>8</sup> The principle of tripartism that exists in specialized labour courts owes its origins to the historical circumstances that prevailed in Germany between 1875 and 1890.<sup>9</sup> The tripartite industrial courts known as *Gewerberichte* were set up in 1890 and consisted of a professional judge and two lay members, one from the employers' side and the other from the employees' side.<sup>10</sup> The concept of full-scale separate courts with jurisdiction over labour matters (*Arbeitsgerichte*) was introduced in 1926.<sup>11</sup> The courts were established with the tripartite structure being retained at all levels.

## 2. Why Labour courts?

Over the years there has been a tension between the individualistic nature of common law, and the protective purpose of labour legislation. In general, the contractual principles of common law tend to undermine the general policy objectives of labour legislation. It was this tension that prompted Lord Wedderburn to state the following;

- ' If labour law is to escape from the clutches of common law thinking and procedures, the compass seems to point in a direction in which few

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<sup>7</sup> Ramm Thilo, op. cit., p 272

<sup>8</sup> Weiss Manfred, *Labour Law & Industrial Relations in the Federal Republic of Germany*, (1987), Kluwer Law & Taxation Publishers p 96

<sup>9</sup> Ibid

<sup>10</sup> Ramm Thilo, op. cit., at p 273

<sup>11</sup> Ibid

instinctively wish to travel. That is (dare one say it?) towards labour courts.<sup>12</sup>

Wedderburn, in advocating for specialized labour courts, was of the view that there was a need to have a 'new kind of judiciary which will assert and develop an autonomous labour law freed from the property based concepts, procedures and habits of the common law.'<sup>13</sup> Wedderburn believed that this new labour law would shatter some of the old employment concepts, in particular those relating to managerial prerogative and the subordination of the employee. This labour law would be further distinguishable by its collective nature and its 'avoidance of legally-imposed solutions'.<sup>14</sup>

Lord Mc Carthy also supported the quest for an autonomous labour law that would be relatively free from the contract of service and able to promote collective bargaining.<sup>15</sup> In Mc Carthy's view, the 'creation of new and separate institutions' would assist in 'restricting the influence of common law norms'.<sup>16</sup>

The role that specialist industrial tribunals play in the resolution of disputes cannot be overemphasized. This role was succinctly described by Steyn JA in the Botswana Court of Appeal decision of *Botswana Railways Organisation v J. Setsogo and 198 Others* as follows:

....." the area of resolution of industrial disputes is a minefield, in which fairness, objectivity and manifest independence are prerequisites for confidence and acceptance of decisions - more specifically as these impact upon emotive,

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<sup>12</sup> Wedderburn, *Labour Law: from here to autonomy*, (1987) 16 ILJ 1 at 126

<sup>13</sup> Hepple B., *Labour Courts: Some Comparative Perspectives* (1988) 41, Current Legal Problems, p 167

<sup>14</sup> Hepple B., op. cit. at 170

<sup>15</sup> Hepple B., op. cit., at 169

<sup>16</sup> Hepple B., op. cit. at 170

volatile- indeed explosive issues. Great care must therefore be taken to ensure that in its composition and the procedures through which its deliberations are conducted, the objectivity, representativeness and impartiality of the Court are beyond legitimate question.”<sup>17</sup>

Different countries have chosen different systems or institutions to deal with unfair dismissal cases. In South Africa arbitration has been chosen over courts to provide a process that would be cheap, accessible quick and informal.<sup>18</sup> In Great Britain tribunals were also chosen for reasons of accessibility, informality, speed and inexpense.<sup>19</sup> In the same vein section 76 (c) of the **New Zealand Employment Contracts Act of 1971** provided for the establishment of a specialist employment tribunal that would operate as a ‘low level, informal, specialist tribunal’ which would provide speedy, fair and just resolution of differences.<sup>20</sup>

## 2.1 Philosophies surrounding Labour Courts

There are certain international ‘best practice benchmarks’ that have been developed over the years regarding dispute prevention and resolution machinery. These benchmarks include;

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<sup>17</sup> *Botswana Railways Organisation v J. Setsogo & 198 Others, Civil Appeal # 51/95*

<sup>18</sup> Colby S. & Newall I., *Unfair Dismissal in South Africa: Comparative Aspects from Great Britain & New Zealand*, unpublished paper delivered to 12<sup>th</sup> Annual Labour Conference, 30 June-2<sup>nd</sup> July 1999, Durban, South Africa p 1

<sup>19</sup> Ibid

<sup>20</sup> Ibid

- Procedures- Dispute settlement systems need to be simple and accessible to potential users so as to encourage the speedy resolution of disputes.<sup>21</sup> Dispute resolution systems should be cost effective and be uniformly applicable to both employers and employees. The system should promote fairness with such fairness being based on the setting of and conformity to minimum standards. The system should also be able to encourage good faith negotiations. Dispute resolution systems should also be able to distinguish between *disputes of right* and *disputes of interest*.<sup>22</sup>
- Tripartism- Many specialist Labour Courts have embraced the concept of tripartism as initiated in the German Courts. The concept of tripartism requires the involvement of government and the social partners in the development of social and economic policy. Tripartism is promoted because it allows for consensus based solutions rather than imposed solutions.<sup>23</sup>

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<sup>21</sup> Kalula E., Bosch C. & Clarke M *Draft Report on Dispute Prevention & Conflict Resolution*, Conference on Labour Relations in Southern Africa, Johannesburg, 12-15 October, 1999, p 69

<sup>22</sup> Kalula e. et al, op. cit. at p 10

<sup>23</sup> Kalula E. et al, op. cit. at p 69

- Dispute prevention is also viewed as a critical element of peaceful industrial relations.<sup>24</sup> This requires a generalized knowledge of labour laws, rules and policies as they are applicable within the labour market.
- Credibility- A dispute resolution system must be staffed with personnel who have the ability to act independently and without bias. This will ensure that the system will achieve a certain amount of credibility.<sup>25</sup>

### 3. Conclusion- Labour Courts in the SADC region

Most countries within the SADC region have some sort of specialist labour court or tribunal.<sup>26</sup> In most of the courts, access to courts is given only after reasonable attempts at conciliation/mediation have been made.<sup>27</sup> Many of the courts, however, do also provide for direct access where appropriate. For instance an urgent application may be made in cases involving threatened industrial action.<sup>28</sup>

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<sup>24</sup> Kalula E. et al, op. cit., at p 70

<sup>25</sup> Kalula E. et al, op. cit., at p 69

<sup>26</sup> Christie S. & Madhuku L. (eds) *Labour Dispute Resolution in Southern Africa*, Friedrich Ebert Stiftung & the Institute of Development & Labour Law, University of Cape Town, (1996) p 9

<sup>27</sup> Ibid

<sup>28</sup> Ibid

Many of the regional labour courts have been criticized for having lengthy and cumbersome processes and extensive technical procedures and formalities.<sup>29</sup> Swaziland, Zimbabwe and Tanzania, in particular are said to have long drawn out processes.<sup>30</sup> In Tanzania, the system is highly litigious with disputes taking up to ten years before they are finally resolved.<sup>31</sup> Many of the labour courts are also alleged to undermine the collective bargaining processes and therefore do not enjoy widespread legitimacy.<sup>32</sup>

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<sup>29</sup> Christie S. & Madhuku L., *op. cit.* at p 11

<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

<sup>32</sup> *Ibid*

## **CHAPTER THREE: Industrial Law before the 1992 reforms**

### **1. Introduction**

The colonial period was characterized by basic contractual common law principles of master and servant.<sup>1</sup> Botswana, as a British Protectorate, was administered by the British High Commissioner resident in South Africa.<sup>2</sup> Accordingly the **Masters and Servants Act of 1856 of the Colony of the Cape of Good Hope** was applicable to Botswana from 1909.<sup>3</sup> Also applicable was the **Protection of African Labourers Proclamation # 14 of 1936**. Under this proclamation, an employee was provided with a very limited amount of security of employment.

These laws were repealed in 1963 and replaced with the **Employment Law # 15 of 1963 (Cap. 47: 01, Laws of Botswana)**. Whilst the Employment Law of 1963 covered a wide range of issues relating to labour relations, it did not provide for the establishment of dispute settlement machinery.<sup>4</sup> The other existing piece of legislation, the **Trade Unions & Trade Disputes Proclamation of 1942**, legalized trade unions and provided limited protection for workers, but also neglected to set out adequate provision for the settlement of disputes.

### **2. Legislative background to the establishment of the Industrial Court**

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<sup>1</sup> Takirambudde P., & Molokomme A., *The new labour law in Botswana*, Sothern African Labour Monographs 1/94, Labour Law Unit, University of Cape Town p 9.

<sup>2</sup> Frimpong K., *The Protection of Security of Employment in Botswana*, paper presented at the ILO/Norway Seminar on protection of employment & promotion of collective bargaining, held at Gaborone, Botswana, Nov. 19-21, 1985 at p 7

<sup>3</sup> *Proclamation # 36 of 1909*

<sup>4</sup> Takirambudde P., & Molokomme A., op. cit., p 9

During independence in 1966, the government of Botswana took certain deliberate policy decisions that were aimed at promoting a stable and peaceful labour relations climate. The **Bill of Rights of the Constitution** guaranteed certain limited rights pertaining to freedom of association. Section B (1) of the **Constitution** specifically provides that;

*“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons, and in particular to form or belong to Trade Unions or other associations for the protection of his interests” \*<sup>5</sup>*

#### 2.1-2.4 Trade Unions & Trade Disputes Proclamation of 1942

The Botswana government demonstrated further commitment to economic development by adopting legislation that updated the 1942 Trade Union and Trade Disputes Proclamation. The government, in 1969, adopted the **Trade Unions Act # 24 of 1969** and the **Trade Disputes Act # 28 of 1969**. During this period industrial peace was increasingly being acknowledged and recognized as being an essential component of sustainable development. The first President of Botswana, Sir Seretse Khama, made the following remarks to workers in Selebi- Phikwe;

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<sup>5</sup> Section B (1), *Constitution of Botswana*, 1966. \* These rights are subject to limitations set out in section 13 (2) of the Constitution. The said section specifies the limits within which freedom of association may be curbed in the interest of good government, the constitutional checks and balances:

- are reasonably required in the interests of defence, public safety, public order, public morality or public health;
- are reasonably required for protecting the rights and freedoms of other persons;
- impose restrictions upon public officers, employees of local government bodies or school teachers;
- are for the registration of trade unions;
- are shown to be reasonably justifiable in a democratic society.



“ ....I am sure we all agree that in order for meaningful development to take place in the country, in an orderly fashion, there is a need for **industrial peace** (emphasis mine) and political stability.”<sup>6</sup>

This realization in turn led to the amendments in 1982/3 of all the previously existing Acts. The new Acts that were introduced consisted of;

(b) A new and overhauled **Employment Act** (of 1982)

(c) A new and improved **Trade Disputes Act** (of 1982)

(d) A new **Trade Unions & Employers Act** (of 1983)

## 2.5 Employment Act of 1982

The Act came into force on the 14<sup>th</sup> of December, 1984 and purported to set a minimum floor of statutory rights which also adheres to set labour standards.<sup>7</sup> For an individual to benefit from these rights, he/she had to fall within the statutory definition of an ‘employee’. According to section 2 (2) of the Act, an ‘employee’ was defined as;

“any person who has, either before or after its commencement, entered into a contract of employment for the hire of his labour. Provided that the expression shall not include any officer or servant of the government unless he belongs to a category of such officers or servants the members of which are declared by the

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<sup>6</sup> Address by the first President of Botswana, the late Sir Seretse Kham addressing workers at Selebi- Phikwe on Dec. 19, 1975, Government Printer, Gaborone, Botswana

<sup>7</sup> Takirambudde P., & Molokomme A., op. cit, p 10

Minister, by order published in the Gazette, to be employees for the purposes of the Act”.<sup>8</sup>

Under this section, the only category of employees who qualified to be defined as ‘employees’ were ‘industrial class’ workers.<sup>9</sup> A further consequence of this section was to exclude agricultural and domestic workers from the ambit of application of the Act.<sup>10</sup>

Under the employment Act, the obligations were generally enforceable in two ways, namely;

- (a) through the enforcement of employee/employer contractual obligations ordinarily set out in civil claims in the appropriate court; or
- (b) through filing a protest with the Department of labour as per section 27 of the Act.<sup>11</sup> Section 27 of the Act allowed labour officers to fine employers where they found the dismissal to be unfair and accordingly had the effect of granting labour officers judicial powers. In a 1995 address the Commissioner of Labour (as he then was) had the following to say on the powers of labour officers;

“.....Officers of the department had extensive powers not only to investigate grievances and disputes, but also to arbitrate and make a determination with the legally enforceable powers of a Magistrate”<sup>12</sup>

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<sup>8</sup> Section 2 (2) of the *Employment Act of 1982*

<sup>9</sup> Ibid

<sup>10</sup> Section 2 (2) of the *Employment Act of 1982*

<sup>11</sup> Section 27 of the *Employment Act of 1982*

<sup>12</sup> Palai M. B, Commissioner of Labour, 1995 address

## 2.6 Trade Disputes Act # 29 of 1982

The Act came into effect in 1983 and set out elaborate rules relating to the control of trade disputes.<sup>13</sup> The Act, amongst other things, addressed the procedures relating to industrial action and prescribed rules for essential and non-essential services.<sup>14</sup> The Act was also significant in that it established a 'quasi-judicial' mechanism in the form of a Permanent Arbitrator.<sup>15</sup> This office was set up primarily to deal with the resolution of *collective trade disputes*. The office of the Permanent Arbitrator was never really functional as it lacked adequate resources, supporting mechanisms and widespread legitimacy.

## 2.7 Trade Unions and Employers Organisation Act of 1983

The Act established a means for the government to regulate trade union activity both internally and externally. The Act also sets out specific and compulsory rules for trade unions or trade union federations to comply with.<sup>16</sup> Many of these rules relate to the actual formation and registration of trade unions. The Act also imposed certain limitations on union membership as well as certain restrictions on office-holding, external affiliation and the receipt of funds from outside of Botswana.<sup>17</sup>

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<sup>13</sup> Takirambudde P., & Molokomme A., *The New Labour Law in Botswana*, op. cit., p 13

<sup>14</sup> Ibid

<sup>15</sup> Section 9 (1), *Trade Disputes Act of 1982*

<sup>16</sup> Takirambudde P., & Molokomme A., *The New Labour Law in Botswana*, ., op. cit.,

<sup>17</sup> Section 63, *Trade Union & Employer Organisations Act of 1983*

### **3. Post 1992 Legislation**

#### **3.1 Introduction**

The rapid economic development that occurred in Botswana from the 1970's onwards soon rendered the 1982/3 reforms inadequate. Accordingly several amendments had to be made to the already established legislation so as to render the legislation relevant to the prevailing economic circumstances.

#### **3.2 Employment Act**

There were several unsatisfactory features of the Act. Some of these aspects related to its statutorily enshrined gender inequalities which placed restrictions on women with respect to certain types of employment.<sup>18</sup> Also unsatisfactory was the fact that the Act neglected to address or provide for the enforcement of the obligations of the **employer** (emphasis mine). Accordingly the amendments to the Act were a welcome development.

The amendments covered several different areas. Of particular relevance were the changes made to the jurisdictional powers and remedies previously given to labour officers. The role of the Commissioner of Labour and his officers was changed from a largely judicial one to a largely mediatory one.<sup>19</sup> Whilst the labor officers still retained the jurisdiction to hear cases, the procedures set out were now different. These procedures are contained in the amended Trade Disputes Act of 1982.

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<sup>18</sup> See: section 115 of the Act which prohibited the employment of females underground in mines. See also section 116 which provided that no female employee shall be employed in any industrial or agricultural undertaking during the night without her express consent.

<sup>19</sup> BOCCIM, Guide to Botswana's Employment Laws, Botswana Gazette, May 13, 1992, Gaborone, Botswana

### 3.3 Trade Disputes (Amendment) Act of 1992

The amended trade Disputes Act provided for the consolidation of all procedures dealing with disputes and grievances. Of particular importance was that the amendments allowed for the broadening of the concept of a 'trade dispute.'<sup>20</sup> The effect of this substitution was to render all disputes arising out of employment subject to the governance of the Trade Disputes Act.

Section 5 of the amended Trade Disputes Act replaced the previously repealed section 27 which related to the right of protest.<sup>21</sup> Section 5 now makes provision for the initial reporting of grievances or unfair dismissals to be made to the nearest labour officer within the prescribed 14 days.<sup>22</sup> Where settlement or resolution of the matter is not achieved, the matter shall be referred to the Commissioner of Labour who has 21 days to settle matters of unfair dismissal. Where the matter still cannot be resolved, the Commissioner is required to issue a 'section 7 certificate' which allows either party or both parties to refer the matter to the Industrial Court.<sup>23</sup>

### 4. Establishment of the Industrial Court

Many of the reports filed prior to the establishment of the Industrial Court, were filed according to the process set out in section 27.<sup>24</sup> The statistics kept by the Labour Department show a substantial increase in the number of cases reported to them over the years. According to the Labour Department's statistics, 2 805

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<sup>20</sup> Section 2, *Trade Disputes (Amendment) Act of 1992*

<sup>21</sup> Section 5, *Trade Disputes (Amendment) Act of 1992*

<sup>22</sup> Ibid

<sup>23</sup> Section 7, *Trade Disputes (Amendment) Act of 1992*

<sup>24</sup> Section 27, *Trade Disputes Act # 29 of 1982*

cases were handled by the district labour officers in 1986 alone.<sup>25</sup> In 1987, this figure rose to 3 056 representing an increase of 9%.<sup>26</sup> The year 1988 showed an increase of 45% with a total number of 5 478 cases being registered.<sup>27</sup> More recent statistics show that in 1996,<sup>28</sup> 7 322 trade disputes were reported to the district labour officers, while in 1998, 8 308 cases were reported.<sup>29</sup> It became increasingly apparent in the late 1980's that the department of labour was not coping with the number of disputes referred to it. The failure to cope is attributable to a number of factors including insufficient training of the officers and a general inadequacy of resources. At this particular time, a trend was also being established within the region. The structural adjustment programmes of the 1990's in the SADC countries also reflected a change of policy that essentially discouraged state involvement in labour relations. The trend that was developed at the time called for governments to reduce their involvement in labour dispute resolutions<sup>30</sup>.

The **South African Labour Relations Act of 1995** is probably the best and most recent example of the increasing trend towards a labour relations system that is free from state control. The LRA established a 'state-funded industrial/labour relations Commission' (CCMA) that is independent from the State and further advocates for private or alternative dispute resolution systems.<sup>31</sup>

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<sup>25</sup> *Department of Labour & Social Security*, 2<sup>nd</sup> Annual Report, 1986, Government Printer, Gaborone, Botswana

<sup>26</sup> *Department of Labour & Social Security*, 3<sup>rd</sup> Annual Report, 1987, Government Printer, Gaborone, Botswana

<sup>27</sup> *Department of Labour & Social Security*, 4<sup>th</sup> Annual report, 1988, Government Printer, Gaborone, Botswana

<sup>28</sup> *Department of Labour & Social Security*, 12<sup>th</sup> Annual Report, 1996, Government Printer, Gaborone, Botswana

<sup>29</sup> *Department of Labour & Social Security*, 14<sup>th</sup> Annual Report, 1998, Government Printer, Gaborone, Botswana

<sup>30</sup> Christie S, & Madhuku L., op. cit. at p 2

<sup>31</sup> Section 112, *South African Labour Relations Act # 66 of 1995*

In Botswana, the move away from state intervention or involvement in the settlement of disputes began in the late 1980's. The former Minister of Labour & Home Affairs, Mr. Patrick Balopi had the following to say on previous government policy;

- *"Our policy in the past has been to intervene administratively in disputes through the offices of the department of Labour.....Although the Trade Disputes Act does provide for arbitration and conciliation, the legislation has not become a central institution in the settlement of disputes, and both employers and workers inevitably continue to turn to Government. A similar problem exists when it comes to individual grievances and in particular the very emotional issue of dismissals. As with collective disputes, there is a danger of the settlement of a grievance being dependent on upon accesses to the corridors of government.*

*I am strongly of the view that Government cannot continue to play this role and as in collective disputes, the time has come to establish independent institutions, free of Government, to which both employees and employers can turn to if they are unable to settle their differences internally.<sup>32</sup>*

This new approach was much more in line with ILO Convention 151 of 1978 which promotes the need to settle disputes around terms and conditions of employment through negotiation between parties or through independent and impartial third party intervention such as mediation, conciliation or arbitration.<sup>33</sup>

The trend towards reduced state intervention in industrial/labour relations culminated in the *1990 Report of the Presidential Commission on the*

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<sup>32</sup> Balopi P.K., Opening speech by Minister of Labour & Home Affairs, Op. cit.,

<sup>33</sup> ILO *The Settlement of Labour Disputes* (LEG/REL Report to the Governing Body), 1998, para 65

*Review of the Incomes Policy*. This report not only recommended the reduction of state intervention in trade disputes, but also advocated for the establishment of a permanent Industrial Court. It was largely as a result of this realization that the Industrial Court came to be established through section 17(1) of the Trade Disputes (Amendment) Act of 1992.<sup>34</sup>

## 5. Conclusion

Since the operation of the 1891 Masters' and Servants Act, it is evident that labour relations in Botswana underwent considerable change and transformation. Up until the establishment of the Industrial Court in 1992, no specialized body had existed to enforce the settlement of labour disputes. The changing labour relation trends of the 1980's-1990's in the SADC region may be seen as the having catalysed the process of change. It is submitted that the establishment of the Industrial Court in 1992 represents a landmark moment in the history of Botswana labour relations.

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<sup>34</sup> Section 17 (1), *Trade Disputes (Amendment) Act*, # 23 of 1992



## CHAPTER FOUR: The Industrial Court

### 1. Introduction- Trade Disputes (Amendment) Act of 1992

One of the most significant amendments to the Trade Disputes Act relates to section 17 which provides for the establishment of the Industrial Court.<sup>1</sup> The Court essentially replaces the office of the Permanent Arbitrator previously established under section 17 of the 1982 Trade Disputes Act.<sup>2</sup>

### 2. Establishment and status of the Industrial Court

Section 1 of the 1995 South African Labour Relations Act defines the purpose of the act as being 'the advancement of labour peace'.<sup>3</sup> In a similar vein, section 17 (1) of the Trade Disputes Act 1995 (Cap 48:02, Laws of Botswana) as amended, established the Industrial Court for the purpose of **settling trade disputes** and the **furtherance, securing and maintenance of good industrial relations** in Botswana.<sup>4</sup> It has been suggested that the term 'settle' requires the Court to take a proactive position with regard to its handling of disputes.<sup>5</sup> The term also implies that the Court is expected to incorporate 'dispute prevention' into its agenda and look for alternative means outside of adjudication to determine trade disputes.

A *trade dispute* is defined in section 2 (interpretation section) of the TDA as including 'a dispute between unions, a grievance and any dispute over-

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<sup>1</sup> Section 17 (1), *Trade Disputes (Amendment) Act of 1992*, Cap. 48:01, Laws of Botswana

<sup>2</sup> Section 17, *Trade Disputes Act # 29 of 1982*

<sup>3</sup> Section 1, *Labour Relations Act # 66 of 1995*, (South Africa) states that 'the purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act....'

<sup>4</sup> Section 17 (1), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>5</sup> Interview held with Judge D. de Villiers, June 17, 2001, Industrial Court, Gaborone, Botswana

- (e) the application or the interpretation of any law relating to employment
- (f) the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;
- (g) the entitlement of any person or any group of persons to any benefit under an existing collective agreement;
- (h) the existence or non-existence of any collective agreement;
- (i) the dismissal, employment, suspension from employment, retrenchment, reemployment or reinstatement of any person or group of persons; or

- (j) the recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;<sup>6</sup>

## 2.1 Court of law and equity

Section 151 (1) of the SA 1995 LRA establishes the SA Labour Court as a court of **law** and **equity**.<sup>7</sup> Section 151 (2) further establishes the Labour Court as a 'superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, **equal** (emphasis mine) to that which a court of a provincial division of the Supreme court has in relation to matters under its jurisdiction'.<sup>8</sup> In contrast the Trade Disputes Act is silent on the question of the status of the Industrial Court. Although the Act does not specify the Industrial Court to be a court of law and equity, the Court has assumed such powers.<sup>9</sup> The Court has, in several of its matters stated that it is a Court of **law and equity**. In the case of *John Bobby Mbayi v Wade Adams*, the Court stated the following;

*"As the Industrial Court is also a court of equity which therefore places a lot of emphasis on fairness and reasonableness to both employer and employee, this Court.....also applies principles well established by other Industrial Courts, which are based on ILO principles, when dealing with retrenchment procedures."*<sup>10</sup> The Court as per de Villiers JP (as he then was) continued to state that;

*"Until I am convinced otherwise or until the Court of Appeal decides otherwise, I am of the view that this Industrial Court in Botswana is a court of law as well as a court of equity. The*

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<sup>6</sup> Section 2, Interpretation section, *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>7</sup> Section 151 (1), *SA LRA* op. cit.

<sup>8</sup> Section 151(2) *SA LRA*, op. cit.

<sup>9</sup> See: *John Bobby Mbayi v Wade Adams* IC 30/94

<sup>10</sup> Ibid

*reasons for saying it is also a court of equity, is inter alia because of the court procedure being less formal and the wide discretion given to the court in the Trade Disputes Act.*"<sup>11</sup>

This position was confirmed in the 1999 Court of Appeal decision of *Botswana Building Society v Samuel Bolokwe*.<sup>12</sup> In this case a security guard had been employed on a one year fixed term contract. The security guard was later dismissed after refusing to be redeployed to another town. The reasons given for his dismissal were given as "refusing to obey a lawful instruction". The Court of Appeal held in this case that "....the exercise of the managements' power to transfer an employee must still conform onto recognized international labour standards as applied by **Courts of equity** (emphasis mine)."

There is currently a proposal to amend the Trade Disputes Act to specifically provide that the Industrial Court is a Court of **law and equity** so as to put the matter beyond doubt.<sup>13</sup>

## 2.2 Status of the Industrial Court vis-à-vis the High Court

As earlier stated, the Trade Disputes Act is silent on the question of the status of the Industrial Court vis-à-vis that of the High Court. The Industrial Court, however, is by virtue of section 127 (1) of the Constitution subordinate to the High Court.<sup>14</sup> The section provides that;

... "subordinate court" means any court established for Botswana other than-

- (a) the Court of Appeal;

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<sup>11</sup> Ibid

<sup>12</sup> *Botswana Building Society v Samuel Bolokwe*, CA # 15/99

<sup>13</sup> ILO/Swiss Project to Advance Social Partnership in Promoting Labour Peace in Southern Africa, *Draft Outline of Amendments to Labour Laws*, p17

(b) The High Court; or

(c) A court martial<sup>15</sup>

This provision is similar to section 110 (2) of the Malawian Constitution.<sup>16</sup> The primary distinction lies in the fact that the Malawian provision expressly stipulates the Industrial Relations Court of Malawi to be subordinate to the Malawi High Court.<sup>17</sup> The section provides that;

*“There shall be an Industrial Relations Court, **subordinate** (emphasis mine) to the High Court, which shall have original jurisdiction over labour disputes and such other issues relating to employment and shall have such composition and procedure as may be specified in an Act of Parliament.”<sup>18</sup>*

Section 110 (2) of the Malawian Constitution shows a deliberate move by the legislature to have the Industrial Relations Court established as a subordinate Court. In contrast, the Constitution of Botswana established the Industrial Court as a subordinate Court by way of omission.<sup>19</sup> It is patently clear, however, that the intention of the Botswana legislature was to give the Industrial Court the same status as the High Court. This can be gleaned from the fact that;

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<sup>14</sup> Section 127 (1), *Constitution of the Republic of Botswana, 1966*

<sup>15</sup> Ibid

<sup>16</sup> Section 110 (2), *Constitution of the Republic of Malawi*

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Section 127 (1), *Constitution of Botswana, op. cit.*

- (a) Judges of the Industrial Court are appointed by the President of Botswana and are required in section 17 (3) to possess the same qualifications as High Court judges;<sup>20</sup>
- (b) Section 28 (1) of the Trade Disputes (Amendment) Act of 1992 provides that; “*Judges of the Industrial Court shall be paid salaries and allowances not less than those payable to Judges of the High Court in accordance with the provisions of the Judges (Miscellaneous Provisions) Act, as from time to time amended, as may be determined by the President.*”<sup>21</sup>
- (c) Section 25(2) of the 1992 Trade Disputes (Amendment) Act, provides that ‘*any decision of the court shall have the same force and effect as a judgment or order of the High Court, and shall be enforceable in like manner as such judgment or order...*’<sup>22</sup>; and
- (d) The right of appeal against decisions of the Industrial Court lies to the **Court of Appeal** and not the High Court.<sup>23</sup>

Since the TDA however, was silent on the status of the Industrial Court in relation to the High Court, the Court of Appeal eventually determined in *Botswana Bank of Botswana Ltd. v Botswana Bank Employees Union* the Industrial Court to be a **subordinate court** (emphasis mine) in terms of section 127(1) of the Constitution.<sup>24</sup> The Industrial Court reiterated this point in its supplementary reasons for judgment in the matter of *Barclays Bank of Botswana Ltd. v Botswana Bank Employees Union* where it stated... “The Court was never requested in terms

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<sup>20</sup> Section 17 (3), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>21</sup> Section 28 (1), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>22</sup> Section 25 (2), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>23</sup> Section 18 (4), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>24</sup> *Botswana Bank of Botswana Ltd. v Botswana Bank Employees Union* IC 40/94

of section 18(3) of the Constitution, to refer this constitutional question to the High Court. The Court was asked to make such a finding itself, which this Court cannot do, as the Industrial Court will also be a **subordinate Court** (emphasis mine) in terms of the definition in Section 127 of the Constitution.”<sup>25</sup> Section 127 is currently being reviewed with the proposed changes to read;

“subordinate court’ means any Court established for Botswana other than-

- (a) the Court of Appeal;
- (b) the High Court;
- (c) a court martial; or
- (d) **the Industrial Court.**<sup>26</sup>(emphasis mine)

This will have the effect of ensuring that the Industrial Court is of an equivalent status to the High Court as initially intended. These proposed changes will be the subject of a referendum to be held in November 2001. If the referendum is agreed to the Industrial Court will have the same status as the High Court.

### 3. Composition of the Court

Section 17 (2) of the TDA stipulates that the Court may consist of one or more divisions, as the Minister considers necessary, each headed by an Industrial Court Judge.<sup>27</sup> Section 17(4) further stipulates that in appointing the Industrial court judges, the President of Botswana shall designate one such judge to be the

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<sup>25</sup> Ibid

<sup>26</sup> Proposed referendum on changes to the Botswana Constitution to be held on October 6, 2001

<sup>27</sup> Section 17 (2), *Trade Disputes (Amendment) Act*, op. cit.

president of the Industrial Court, and any other judges shall rank according to their dates of appointment.

Subsection 3 of 17 provides that Industrial Court Judges are to be appointed by the President (of Botswana) from among persons possessing the qualifications to be judges of the High Court as prescribed in section 96(3) of the Constitution.<sup>28</sup> According to section 96(3) of the Constitution, a person shall not be qualified to be appointed as a judge of the High Court unless;

- *(a) he holds, or has held office, as a judge of a court having unlimited jurisdiction in civil and criminal matters in Botswana, in a Commonwealth country, or in any country outside the Commonwealth that may be prescribed by Parliament or a court having jurisdiction in appeals from such act; or-*
- *(b) he is qualified to practice as an advocate in such a court and has been qualified for not less than five years to practice as an advocate or attorney in such a court.*<sup>29</sup>

The qualifications required of a labour court judge, are therefore, general in nature. Neither the Trade Disputes Act nor the Constitution require labour court judges to have specialist knowledge in the area of labour law as. In contrast, section 153(2)(a) & (b) of the 1995 SA LRA require the Judge President and Deputy Judge President of the labour court to;

- (a) ...be judges of the Supreme Court; **and** (emphasis mine)
- (b) ...have knowledge, experience and expertise in labour law.<sup>30</sup>

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<sup>28</sup> Section 17(3), *Trade Disputes (Amendment) Act*, op. cit.

<sup>29</sup> Section 96 (3), Constitution of Botswana, op. cit.

<sup>30</sup> Section 153 (2)(a) & (b), 1995 SA LRA, op. cit.



On a similar note, subsection 6 (a) & (b) of s 153 of the LRA provides that a judge of the labour court must;

- (a) (i) be a judge of the High Court; or
- (ii) a legal practitioner; **and** (emphasis mine)
- (b) have knowledge, experience and expertise in labour law.<sup>31</sup>

### 3.1 Appointment of a Registrar

The Trade Disputes Act does not specifically provide for the appointment of a Registrar, Deputy Registrar or otherwise. Section 17 (8), however provides that ‘there shall be appointed such public officers as may be necessary to staff the Court, and enable it to carry out its functions under this Act.’<sup>32</sup> This section is to be contrasted with section 155 of the 1995 South African LRA which specifically provides for the appointment of a Registrar, Deputy Registrar(s) and as many officers of the Labour Court as the administration of justice requires.<sup>33</sup> Section 155(a) of the SA LRA further requires that the Registrar be a person who has experience and expertise in **labour law and administration**<sup>34</sup> (emphasis mine).

### 3.2 Assessors

Section 17(6) of the TDA provides that a judge shall sit with two nominated members, one of whom shall be selected by him from among ten persons nominated by the organization representing employees or trade unions in

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<sup>31</sup> Section 153 (6) (a) & (b), *1995 SA LRA*, op. cit.

<sup>32</sup> Section 17 (8), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>33</sup> Section 155, *1995 SA LRA*, op. cit.

<sup>34</sup> Section 155(a), *1995 SA LRA*, op. cit.

Botswana, and the other selected by him from among ten persons nominated by the organization representing employers in Botswana.<sup>35</sup> The section also contains a proviso that “where for any reason such nominated members are, or either of them is, absent for any part of a hearing of any trade dispute, the jurisdiction of the court may be exercised alone or with the remaining member of the Court....unless the judge for good reason decides that the hearing be postponed.”<sup>36</sup> Section 18 (2) of the TDA also provides that matters of law are to be decided by the presiding judge.<sup>37</sup> The decision as to what constitutes matters of fact and law, is also decided by the judge presiding.<sup>38</sup> Section 17 (6) of the TDA is similar to section 17 (19) (a) (ii) of the 1956 SA LRA (Act # 28) which allowed for the President of the Court to appoint assessors, if he deemed it expedient to do so, to represent the interests of employers and employees’ respectively. Under the previous LRA, assessors were appointed to assist the Industrial Court in an advisory capacity. Under the current SA LRA, However, there is no provision for assessors. Most of the other SADC countries have similar provisions in their Labour Relations Act. Section 66 (1) (c) and (d) of the Malawian Labour Relations Act stipulates that the Industrial Relations Court shall consist of five persons nominated by the most representative organization of employees and five persons nominated by the most representative organization of employers. These persons are to be appointed by the Minister. Malawi is unique in that, section 66 (2) requires at least one woman to be represented on the ‘employee’ and ‘employer’ panels. It also shows adherence to the principle of

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<sup>35</sup> Section 17(6), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>36</sup> Ibid

<sup>37</sup> Section 18(2), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>38</sup> Ibid

industrial democracy and ‘reflects government of the industrial process by all concerned or by their elected representatives’.<sup>39</sup>

#### **4. Jurisdiction**

##### **4.1 Exclusive jurisdiction**

The jurisdiction of the Court is set out in section 18(1) of the TDA:

“The Court, or any division of the Court, shall have **exclusive jurisdiction in every matter properly before it** (emphasis mine) under this Act.<sup>40</sup> Exclusive jurisdiction was interpreted by the Court of Appeal in *Botswana Railways Organisation v Setsogo & 198 Others* to mean ‘...the Court shall be seized exclusively of matters which are properly before it under the Act. That does not mean that all **industrial matters have become the exclusive preserve of the Industrial Court** (emphasis mine). It means when a matter which because of the limited nature of the Courts jurisdiction which is related to an industrial or trade dispute is properly before the Court, the Court should have exclusive jurisdiction to hear and determine that reference.”<sup>41</sup>

The jurisdiction of the Court shall include the power to;

(a) hear and determine all trade disputes<sup>42</sup>;- a trade dispute is defined in section 2, the interpretation section of the TDA as to include a dispute between unions, a grievance and any dispute over-

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<sup>39</sup> Sections 66 (1), (c) & (d) and section 66(2) , *Labour Relations Act*, Malawi

<sup>40</sup> Section 18 (1), Tradw

<sup>41</sup> *Botswana Railways Organisation v Setsogo & 198 Others*, Ca # 51/95

<sup>42</sup> Section 18 (1), *Trade Disputes (Amendment) Act Of 1992*, op. cit.

- the application or the interpretation of any law relating to employment;
- the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;
- the entitlement of any person or group of persons to any benefit under an existing collective agreement;
- the existence or non-existence of any collective agreement;
- the dismissal, employment, suspension from employment, retrenchment or reinstatement of any person or group of persons; or
- the recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment.<sup>43</sup>

(b) to enjoin any employee or employer, or any trade union or employers organization, from taking or continuing any industrial action;<sup>44</sup>

(c) to refer any matter to an expert and at its discretion, to accept his report as evidence in the proceedings;<sup>45</sup>

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<sup>43</sup> Section 2, Interpretation section, *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>44</sup> Section 18(1), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>45</sup> Ibid

- (d) generally to give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.<sup>46</sup>

It is currently being proposed that amendments be made to the Trade Disputes Act to give the Industrial Court **exclusive civil jurisdiction in respect of trade disputes**<sup>47</sup> (emphasis mine). The object of this provision is to prevent ‘forum shopping and the development of conflicting jurisprudence’. Plans are also under way to request the Office of the Attorney General to consider ways of achieving this objective without having to amend the Constitution, (ie by making the Industrial Court a division of the High Court)<sup>48</sup>. In addition, a number of amendments have also been proposed in respect of Section 18 of the TDA. It is further proposed that the Court be given the power-

- to interdict any unlawful industrial action;<sup>49</sup>
- to hear appeals and reviews from decisions of mediators and arbitrators;<sup>50</sup>
- to direct that the matter be referred for mediation under section 3, if in the opinion of the Court the matter has not been properly mediated or is ripe for further mediation;<sup>51</sup>

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<sup>46</sup> Ibid

<sup>47</sup> ILO/Swiss Project, *Draft Outline of Amendments to Labour Laws*, op. cit. p17

<sup>48</sup> Ibid p17

<sup>49</sup> Ibid p17

<sup>50</sup> Ibid p17

<sup>51</sup> Ibid p17

- to direct the Commissioner to refer a dispute that is before the Court to arbitration.<sup>52</sup>

#### 4.2 Jurisdiction relating to disputes of right/disputes of interest

Disputes of right are also known as '*judicable disputes*' and generally relate to the interpretation, implementation or violation of existing rights, whether such rights flow from statutory law, collective agreements or individual employment contracts.<sup>53</sup> Such disputes are normally subject to adjudication, (ie; dispute resolution by a court of law) or arbitration.<sup>54</sup> Disputes of interest are sometimes referred to as '*economic interests*' and usually arise when there is a disagreement as to new terms and conditions of work, or the renewal of those that have expired.<sup>55</sup> Such disputes can also be regarded as disputes concerning the creation of new rights, ie; through collective bargaining. These disputes are not based on existing rights and are usually non-judicable.<sup>56</sup> They are normally resolved by the use of social and economic power (eg, strikes and lockouts).

The TDA is silent as to whether the Industrial Court is empowered to hear disputes of rights **and** disputes of interest. Interestingly enough, the Court, has on its own, assumed a *quasi-judicial* function and awarded itself the right to determine disputes of right and disputes of interest. In the cases of *Debswana Diamond Company (Pty) Ltd. v Botswana Mining Workers Union* and *Morupule Colliery Ltd. v Botswana Mining Workers Union*,<sup>57</sup> the question was raised as to whether the

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<sup>52</sup> Ibid p17

<sup>53</sup> Barker F. & Holtzhausen M., *South African Labour Law Glossary*, 1st ed., Juta & Co. (1996) p 41

<sup>54</sup> Ibid p 41

<sup>55</sup> Ibid p 41

<sup>56</sup> Ibid p 41

<sup>57</sup> *Debswana Diamond Company (Pty) Ltd. v Botswana Mining Workers Union*, IC 34/94, *Morupule Colliery Ltd. v Botswana Mining Workers Union*, IC 64/95

Court had the jurisdiction to determine a matter concerning wages and terms and conditions of employment. In these cases the Court held that section 18(1) (a) of the TDA empowered the Court to '*hear and determine all trade disputes*'.<sup>58</sup> The Court further found that the relevant portion of the definition of a *trade dispute* was contained in section 2(b) of the TDA.<sup>59</sup> The section provides that: "*trade dispute*" includes a dispute between unions, a grievance and any dispute over-

- *the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;*<sup>60</sup>

The court was therefore satisfied that the said Act conferred jurisdiction on the Industrial Court to determine *wage disputes and disputes regarding other terms and conditions of employment*. Labour law academics and practitioners alike hold contrasting views on whether a labour Court should determine disputes of rights **and** interest (emphasis mine). Weiss, a noted labour law scholar, held the view that 'labour courts, as all other courts, are only competent for the disputes of rights and not for disputes of interests'.<sup>61</sup> In advocating this principle, however, Weiss does acknowledge that the borderline between the two categories is 'becoming less and less clear'.<sup>62</sup>

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<sup>58</sup> *Debswana case & Morupule case*, op. cit.

<sup>59</sup> Ibid

<sup>60</sup> Section 2 (b), *Trade Disputes (Amendment) Act*, op. cit.

<sup>61</sup> Weiss M., *Labour Law & Industrial Relations in the Federal Republic of Germany*, 1987, Kluwer law & taxation publishers

<sup>62</sup> Ibid

A recommendation has been made proposing an amendment to the Trade Disputes Act stipulating that *disputes of interest* are no longer within the jurisdiction of the Botswana Industrial Court.<sup>63</sup>

#### 4.3 Jurisdiction over constitutional matters

The Industrial Court is a creature of statute and accordingly has limited jurisdiction. Section 18 (1) (a) of the TDA empowers the Industrial Court to determine all **trade disputes**.<sup>64</sup> Any matters involving constitutional issues, however are transferred to the High Court for hearing. Part IV of the Constitution of Botswana deals with the interpretation of the Constitution with section 105 dealing specifically with referrals to the High Court of cases involving interpretation of the Constitution.<sup>65</sup> Section 105 (1) provides that

- (1) Where any question as to the interpretation of this Constitution arises in any proceedings in any **subordinate** (emphasis mine) court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court.<sup>66</sup>
- (2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court in which the question arose shall, subject to any appeal, dispose of the case in accordance with that decision.<sup>67</sup>

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<sup>63</sup> Ilo/Swiss Project, op. cit. p 17

<sup>64</sup> Section 18 (1) (a), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>65</sup> Section 105, *Constitution of Botswana*, op. cit.

<sup>66</sup> Section 105 (1), *Constitution of Botswana*, op. cit.

<sup>67</sup> Section 105 (2), *Constitution of Botswana*, op. cit.



This rule was first cited in the case of *Botswana Bank of Botswana Ltd. V Botswana Bank of Employees Union & Others*.<sup>68</sup> In this matter certain constitutional infringements were alleged to have occurred. The Industrial Court held that constitutional matters are to be brought before the High Court. The Court further held that where it is alleged that certain provisions dealing with the protection of fundamental rights and freedoms of the individual are infringed, such action must be brought before a competent Court.<sup>69</sup> The Industrial Court is not such competent court as it has no jurisdiction to adjudicate on constitutional matters.<sup>70</sup>

In contrast, section 157 (2) of the 1995 SA LRA specifically states that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the RSA, 1996 and arising from;

- (a) employment and labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.<sup>71</sup>

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<sup>68</sup> *Botswana Bank of Botswana Ltd. v Botswana Bank of Employee union & Others* IC 40/94

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Section 157 (2), 1995 SA LRA, op. cit.

#### 4.4 Territorial jurisdiction

The TDA is silent as to the territorial jurisdiction of the Court. The court is based in Gaborone and exercises jurisdiction throughout the country. Territorial jurisdiction can be implied from the 'exclusive jurisdiction' awarded to the Court in section 18 of the TDA.<sup>72</sup> Although not expressly stipulated in the Act, the seat of the Court would have to be Gaborone as there are no other offices of the Court in the region.

The Act is also silent as to whether the Industrial Court has jurisdiction over persons residing outside of Botswana. The validity of this question comes into play in instances involving the attachment of property. It is not clear whether or not the Industrial Court would have the power to make orders of attachment over persons residing outside of Botswana.

#### 4.5 Retrospective jurisdiction

One of the legislative problems encountered by the Court revolved around the Acts silence and omission regarding the commencement of the jurisdiction of the court. This lacuna in the law resulted in a number of cases being set aside. In the case of *Galeakanye Modise v Botswana Building Society* the Applicant had been dismissed by the Respondent on the 27<sup>th</sup> January 1992, which was more than two years prior to 1 April 1994, being the date on which the Trade Disputes Act was deemed to come into operation.<sup>73</sup> The 1<sup>st</sup> of April, 1994 was also the date of establishment of the Industrial Court. In this matter, the Respondents challenged the jurisdiction of the Court. The Court stated the following;

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<sup>72</sup> Section 18, *Trade Disputes Act*, op. cit.

<sup>73</sup> *Galeakanye Modise v Botswana Building Society* IC 5/94

*"The fact that the Court was only established on 1 April 1994 does not necessarily mean that the Court cannot have jurisdiction in disputes which arose before 1 April 1994. The Legislature can confer such jurisdiction in the same Act on the Court by either providing that the said Act shall operate retrospectively or by conferring jurisdiction during a transitional period from the old procedure to the new procedure or thirdly the Interpretation Act may provide for such a situation."*<sup>74</sup>

In its determination, the Court scrutinized the Trade Disputes (Amendment) Act 1992 and found nothing in the express provisions or the language of the said Act which in any way indicated an intention by the Legislature to authorize retrospective operation. Consequently, the Court held that it 'cannot clothe itself with jurisdiction' in such cases, nor can it assume jurisdiction when it patently doesn't have jurisdiction.<sup>75</sup> Nor can the parties agree to the Court having jurisdiction in such cases. It is only the Legislature that can grant such jurisdiction. The Court further suggested that the Legislature consider amending the Trade Disputes (Amendment) Act, 1992 to give the Industrial Court retrospective jurisdiction to determine all such unresolved disputes, which were 'in limbo' and/or to make provision for the Court to have jurisdiction during the transitional period.<sup>76</sup> The legislature did so by amending section 1 of Act No. 23 of 1992 to include the following proviso;

*"Providing that, notwithstanding such date of commencement, in relation to the Industrial Court established under and in accordance with section 8 of this Act, any dispute originating or*

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<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

*remaining unresolved prior to the date of commencement may be referred to the industrial Court for determination.*<sup>77</sup>

The effect of this amendment was to allow disputes that arose between 9<sup>th</sup> October and 1<sup>st</sup> April, 1994 to be determined by the Industrial Court.

## 5. Powers and Procedures of the Industrial Court

### 5.1 Procedures-general

The general powers of the Court are set out in section 18 of the Trade Disputes Act.<sup>78</sup> Section 19(1) of the TDA also gives the Industrial Court the power to hear evidence.<sup>79</sup> Subsection (2), in particular empowers the Court to order any person to-

- (a) furnish, in writing or otherwise, such particulars in relation to the matter as it may require;
- (b) attend before it;
- (c) give evidence on oath or otherwise;
- (d) produce any relevant document.<sup>80</sup>

In general the Court is empowered to subpoena witnesses, administer oaths or affirmations. Require the production of books and documents and generally

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<sup>77</sup> Section 2, *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>78</sup> Section 18, *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>79</sup> Section 19 (1), *Trade Disputes (Amendment) Act of 1992*, op.cit.

<sup>80</sup> Section 19 (2), *Trade Disputes (Amendment) Act of 1992*, op. cit.

exhibit the powers of an ordinary civil court.<sup>81</sup> These provisions are almost identical to section 17 (11) of the 1956 SA LRA.<sup>82</sup> The general powers of the Court are also contained in section 18 of the Trade Disputes Act as previously set out. The Industrial Court Rules set out the procedures of the Court with Rule 12 providing the following;

- (1) Without prejudice to the general discretion granted to the Court by section 18(1)(d) of the Act, the Court may on application or of its own motion at any time:
  - (a) before or after the expiry of any period condone any failure to comply with any rule including time periods save for the time within which an appeal may be noted to the Court of Appeal and may abridge any time prescribed by these Rules;
  - (b) allow the allegations in any form to be amended at any time;
  - (c) if in any proceedings it appears that any party to the proceedings has been incorrectly or defectively cited, correct the error or defect, or order the substitution of a party;
  - (d) join any other person at any time on such terms and conditions as it deems fit.
  - (e) Make an order consolidating the disputes pending before it in separate proceedings where it deems such consolidation to be expedient and just;

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<sup>81</sup> Ibid

<sup>82</sup> Section 17 (11), 1956, SA LRA, op. cit.

- (f) Allow any party at any time to amend his application or his opposition;
- (g) Grant any order in the absence of any party if it is satisfied that, that party has had notice of the date of set down and that all relevant documents have been served on such party;
- (h) Rescind on good cause shown, any order made by it on the absence of a party;
- (i) Order any person who fails to comply with any notice or directive given in terms of these Rules to do so/and or order that any party in default shall not be entitled to any relief in such proceedings;
- (j) Set aside any irregular step which has been taken by another party unless the party complaining of the irregular step has, with knowledge of the irregular step, taken any further step in the proceedings;
- (k) Declare, in the case of a partnership or a firm, that any person was at a certain time or for a certain period a partner of a partnership or the proprietor of a firm;
- (l) Grant on application:
  - (i) urgent relief;
  - (ii) urgent interim relief pending a decision by the court after a hearing;

- (iii) an interdiction or any other order in the case of any action that is prohibited by law regarding any trade dispute; provided that in the case of urgent relief sought the provisions of sub-rules 7 (1) (b) and (c) and 7 (2) shall not apply;
  - (m) before or during a hearing, grant a rule nisi (an order requiring the other party to show cause why a certain order should not be made) and confirm or discharge a rule nisi on a return date if appropriate unless the Act otherwise provides;
  - (n) preside at any pre-hearing conference.<sup>83</sup>
- (2) In any application referred to in sub-rule (1) the Court may make such order as it deems fit, including an appropriate order as to costs if such costs are permissible in terms of section 27 of the Act.<sup>84</sup>
  - (3) It will be in the discretion of the judge to decide when and for how long the court will be in recess in any given year.<sup>85</sup>
  - (4) The Court in the exercise of its powers and discretion, and in the performance of its functions, or in any matter incidental thereto, may act in such a manner as it may consider expedient in the circumstances in order to achieve the objectives of the Act, and in so doing it shall have regard to substance rather than form, save as is otherwise provided in the Act.<sup>86</sup>

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<sup>83</sup> Rule 12 (1) (a)- (n), *Industrial Court Rules (Botswana)*

<sup>84</sup> Rule 12 (2), *Industrial Court Rules, (Botswana)* op. cit

<sup>85</sup> Rule 12 (3), *Industrial Court Rules, (Botswana)*, op. cit.

<sup>86</sup> Rule 12 (4), *Industrial Court Rules, (Botswana)*, op. cit.

The Act also provides in section 18(3) that the decision of the majority of the persons representing the Court shall be the decision of the Court: provided that where there is no majority decision, the decision of the judge shall prevail.<sup>87</sup> This provision is similar to section 17(4) (b) and (c) of the 1956 SA LRA which provided that a decision of a majority of members or member shall be the decision of the Industrial Court, provided that where more than one member is appointed, the member appointed as Chairman shall in the event of an equality of votes, have a casting as well as a deliberative vote.<sup>88</sup>

The Act does not specifically refer to the offence of 'contempt of court', but it does state however, in section 19(4) of the TDA, that any person who fails to comply with an order given under section 19 of the TDA, is guilty of an offence and liable to a fine of P500 (around R700) and imprisonment for three months.<sup>89</sup>

Another one of the legislative impediments experienced by the Industrial Court, was in relation to its powers to vary or rescind default judgments. The 1992 Amendment Act did not give the Court the power to amend or vary its decisions. The general rule was that after having given judgment, the Court was *functus officio* and had no power to amend its judgment thereafter unless specific provision was made in the Act for such power. The only provision in the Trade Disputes Act which provided for the 'clarification or rectification' of a judgment of the Industrial Court was section 26 (3) of the Employment Act. The section provides as follows;

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<sup>87</sup> Section 18 (3), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>88</sup> Section 17 (4), (b) & (c), *1956 SA LRA*, op. cit.

<sup>89</sup> Section 19 (4), *Trade Disputes (Amendment) Act of 1992*, op. cit.



26 (3) *If any question arises as to the interpretation of a decision, or as to a decision being inconsistent with any written law, the Minister or any party to the decision may apply to the Court for a determination of the question, and the Court shall determine the matter after hearing the parties concerned, or if the parties concerned consent, without such hearing, and any such determination shall be deemed to be a decision made under this Act:*

*Provided that, where the question arises out of any clerical or incidental error or omission, the Court may rectify such error or omission without hearing the parties concerned.*<sup>90</sup>

In the case of *George Mokaya v Morteo Condotte (Pty) Ltd.*<sup>91</sup>, at page 4, the Court held that section 26 (3) of the Employment Act empowered the Court to clarify its decisions if any question arises as to the interpretation of such decision and empowers the Court to rectify its decision only in the following two circumstances. Firstly it can do so on application where such decision is inconsistent with any written law. Secondly the Court can *mero motu* or on application rectify any clerical or incidental error or omission. The Courts inability to vary its judgments was eventually rectified through the insertion of sections 25 A and 25 B in the Trade Disputes (Amendment) Act, 1998. The inserted sections provided;

25 A (1) A judgment or order obtained in default of appearance or of defence or in the absence of one of the parties to the action or proceeding (in this section referred to as a "default judgment") may be rescinded or varied on the application, in accordance with the provisions of subsection (2), of the party affected by the default judgment.<sup>92</sup>

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<sup>90</sup> Section 26 (3), Employment Act

<sup>91</sup> *George Mokaya v Morteo Condotte (Pty) Ltd.* IC 24/95 at p 4

<sup>92</sup> Section 25 A (1), *Trade Disputes (Amendment) Act # 24 of 1998*

(2) A party affected by a default judgment may, within one month after he has knowledge of the default judgment, apply to the Court, upon notice to the party in whose favour the default judgment was given, to vary or set aside such default judgment, and the Court may, on good and sufficient cause shown by the party against whom the default judgment was given, vary or set aside the default judgment on such terms as it deems just in the circumstance.<sup>93</sup>

25 B (1) The Court may, *mero motu* or on the application of any party affected, rescind or vary-

- (a) an order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;
- (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to all parties;
- (d) an order or judgment granted as an issue raised *in limine* if having regard to changed circumstances since such order or judgment was granted it would be unjust or inequitable to allow such order or judgment to stand;<sup>94</sup>

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<sup>93</sup> Section 25 A (2), *Trade Disputes (Amendment) Act of 1998*, op. cit.

<sup>94</sup> Section 25 (B) (1), *Trade Disputes (Amendment) Act of 1998*, op. cit.

(2) Any party desiring any relief under this section shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.<sup>95</sup>

(3) The Court shall not make any order rescinding or varying any order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the order proposed.<sup>96</sup>

Recommendations have been made to amend the Trade Disputes (Amendment) Act to give the Industrial Court the following additional powers;

- to hear appeals and reviews from mediators and arbitrators;
- to determine disputes as to whether or not a trade dispute is one of interest or not;
- to confirm contempt orders from arbitrators;
- to impose administrative penalties for non-attendance and non-compliance;
- to give the Judge President the power to refer disputes to arbitration.<sup>97</sup>

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<sup>95</sup> Section 25 (B) (2), *Trade Disputes (Amendment) Act of 1998*, op. cit.

<sup>96</sup> Section 25 (B) (3), *Trade Disputes (Amendment) Act of 1998*, op. cit.

<sup>97</sup> ILO/Swiss Project, op. cit. p 17

## 5.2 Procedure-Access to the Court

### 5.2.1 Level One-District Labour Office

Generally speaking, no case can come before the Industrial Court without first having been heard and mediated over by the Labour Department officials. In *Mogae Mmolawa v Lobatse Clay Works* the court stated the following;

“ This procedure to refer disputes directly to the Industrial Court should not be encouraged as it was never the intention of the legislature that this procedure should be followed and in any case parties should be encouraged to follow the mediatory procedure via the District Labour Officer and the Commissioner of Labour as there are several advantages in such procedure. It is less costly, less time-consuming and a settlement could be reached at a much earlier stage.”<sup>98</sup>

The Industrial Court has since made a number of significant rulings in respect of the required procedure as it related to termination of employment at district labour officer level.

(a) According to the requirements of section 5 (6)(d) of the 1995 TDA, an employee was required to exercise his/her right of protest within 14 days of *learning of the termination or intended termination of the contract of employment*.<sup>99</sup> The Court, in the case of *Mogae Mmolawa v Lobatse Clay Works* dismissed the matter for non-compliance with section 5 (6) (d) of the TDA. In this case the court proceeded to examine the aim, scope and objection of the legislative enactment and came to the conclusion that “*it was clearly the intention of the legislature to achieve some finality in dismissal cases as soon as possible*”. The Court proceeded to note that

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<sup>98</sup> *Mogae Mmolawa v Lobatse Clay Works* IC 28/95

<sup>99</sup> Section 5 (6) (d), *Trade Disputes (Amendment) Act of 1995*

there was no provision in the Act for the “*District Labour Officer or the Commissioner of Labour to condone any failure to comply with the said 14 day period*”.<sup>100</sup> (emphasis mine)

Several other ‘termination of employment’ matters that came before the Court were also dismissed for non-compliance. A new section 6 A (3) has since been introduced by section 7 of the 1997 Act to now provide the following;

- “an employee shall be deemed to have waived his right of protest under this section unless he exercises within 14 days immediately after learning of the termination or the intended termination of the contract of employment”.....”Provided that a labour officer, the Commissioner or the Court may, on good cause shown, condone any delay in making a protest”.<sup>101</sup>
- (b) An employee who wished to protest a termination of employment was required under section 5 (2) to make a report in **writing** (emphasis mine) to the nearest Labour officer (section 5 (6)), and serve a copy of the report upon every other party to the dispute (section 5(4) of the Act). In *Tlhadiso Gabofakwe v Msutse (Pty) Ltd*, the Applicant made a verbal report to the District Labour Officer in Molepolole.<sup>102</sup> The Court held that section 5 (6) provided for a specific procedure for an employee wishing to protest against the termination of his contract of employment. The court further held that the requirements in section 5(2), (4) and (6) must be complied with when a protest against termination is made. The court found that the District Labour officer was not entitled to entertain the protest nor was he entitled to refer it

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<sup>100</sup> *Mogae Mmolawa*, op. cit.

<sup>101</sup> Section 6 A (3), *Trade Disputes (Amendment) Act # 14 of 1997*

<sup>102</sup> *Tlhadiso Gabofakwe v Msutse (Pty) Ltd*. IC 76/96

to the Commissioner of Labour. The Court found the section 7 certificate that had been issued to be invalid and consequently held that the matter was not properly before the Court.

Section 7 of the 1997 Trade Disputes (Amendment) Act has since introduced a new section 6 A which provides that *the employee wishing to protest against the termination (of employment) shall make such protest to the nearest labour officer.*" The effect of this provision is to remove the requirement that the protest be in **writing** (emphasis mine).<sup>103</sup>

#### 5.2.2 Level two-Commissioner of Labour- 1983 Trade Disputes Act

The procedure at the level of the Commissioner of Labour under the 1983 Trade Disputes Act entailed a personal enquiry by the Commissioner into the causes and circumstances of the dispute. Section 6 (1) of the 1983 Trade Disputes Act provided that "the Commissioner shall consider every trade dispute reported to him under section 5..." Section 6 (2) (a) set out the manner in which the Commissioner was expected to conduct such enquiry. The section provided that 'the Commissioner shall-

*(a) inquire into the cause and circumstances of the dispute and, in the performance of this duty, request every party to the dispute to attend before him, either in person or by a representative, at such time and place as he shall designate..*"<sup>104</sup>

In *Motseta v Mondial* the court held that a referral by the Commissioner requires mediation by the Commissioner.<sup>105</sup> The court reiterated this position in the case

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<sup>103</sup> Section 6 A, *Trade Disputes (Amendment) Act of 1997*

<sup>104</sup> Section 6 (2), (a), *Trade Disputes Act, 1983*

<sup>105</sup> *Motsetat v Mondial* IC 33/97

of *Keduetse Kemoabe v Yalona Chemist*<sup>106</sup> where it held that the court could not exercise jurisdiction to hear the case as the Commissioner had not exercised his mediatory powers. In case after case, the Court emphasized that **‘this duty could not be delegated by the Commissioner to any other officer’** (emphasis mine), (see also: *Gosalamang Moroka and 112 Others v Feedem Catering Services (Botswana) (Pty) Ltd*. IC 137/96)

The Court also held that the Commissioner was required as a matter of procedure, to request every party to the dispute to **attend before him**. In *Francisca Petto v Colgate Palmolive (Botswana) (Pty) Ltd*, the Court found that the District Labour Officer had *wrongly referred* the dispute, as the parties had not appeared before the Commissioner. Following an enquiry into the causes and circumstances of the case, section 6 (2) (b) of the 1983 TDA then empowered the Commissioner to appoint an industrial relations officer from the department to conciliate in the dispute.

#### 1997 Trade Disputes (Amendment) Act

Under the 1997 Trade Disputes (Amendment) Act, a new section 6 has been created with the insertion of the words “*or the labour officer delegated by him*”. The consequence of this amendment is to remove the requirement that the Commissioner personally enquire into the causes and circumstances of the dispute. The new section also allows the Commissioner to **delegate** his functions to a labour officer. A new section 6 A (5) also provides for a new *streamlined* procedure in that it stipulates that:

“Where the labour officer is unable to negotiate a settlement of a dispute between the parties, he shall

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<sup>106</sup> *Keduetse Kemoabe v Ya Lona Chemist* IC 62/96

- (a) where he is of the opinion that there is no likelihood of a settlement by further mediation, request the Commissioner to issue a certificate in terms of Section 7 for the dispute to be referred to the Industrial Court; or
- (b) refer the matter to the Commissioner together with a report of his efforts to secure a settlement”<sup>107</sup>

### 5.2.3 Level three-Access to the Industrial Court

Under normal circumstances, a dispute cannot be directly referred to Industrial Court. Existing legislation provided for two ways in which a dispute could be referred to the Industrial Court. Referral could either be by virtue of a section 7 certificate issued by the Commissioner of Labour under the TDA<sup>108</sup> or by ministerial direction as per section 9 (1) (as amended) of the TDA. Section 9 (1) provides that:

“Where the Minister is satisfied that a trade dispute exists or is apprehended and where-

- (a) any industrial action, whether actual or declared, in furtherance of the trade dispute has been declared by the Minister under this Act to be unlawful;
- (b) the dispute involves an essential service ; or
- (c) the Minister is satisfied that the dispute has or may jeopardize the essentials of life or the livelihood of the people of Botswana or a significant section thereof or may endanger the public safety or the life of the community,

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<sup>107</sup> Section 6 A (5), *Trade Disputes (Amendment) Act, of 1997, op. cit.*

<sup>108</sup> Section 7, *Trade Disputes (Amendment) Act of 1992, op. cit.*



objectives of speed, and easy access were attributed to its legalistic procedures.<sup>99</sup> Tribunals in the UK were said to have adopted an adversarial approach which encompassed two main aspects, namely;

- (a) control over the pre-hearing process- this entailed substantial control by parties over the definition of issues to be discussed, choice of evidence and witnesses etc....<sup>100</sup>
- (b) Control over the actual hearing- this entailed substantial control by the parties over the conduct of the hearing. (It includes the parties statements of case, examination, cross-examination and re-examination of witnesses.) In this instance, the tribunal would only intervene for the purpose of clarifying testimony.<sup>101</sup>

An inquisitorial system places a duty on the judge, or dispute resolver, to inquire into the facts and where appropriate, the law upon which the claim is based.<sup>102</sup> In this system the adjudicator plays the role of an inquisitor who 'actively seeks out the facts by calling witnesses and questioning them'.<sup>103</sup> This model is predominately used by many of the European countries and is sometimes used in South African arbitration.. This type of approach also places a far greater demand on the competence and impartiality of the arbitrators as it requires them to more or less 'dominate the hearing'. Studies have indicated that the 'investigative approach' is most suitable in dismissal cases, as it 'offers the optimum in terms of

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<sup>99</sup> Clark, op. cit. at 612

<sup>100</sup> Ibid at 612

<sup>101</sup> Ibid at 612

<sup>102</sup> Corby S. & Newall I., op. cit. at 7

<sup>103</sup> Clark, op. cit. at 616

accessibility, informality and speed'<sup>104</sup> as well as providing the 'most efficient return on costs to both litigants and the public purse'.<sup>105</sup>

The investigative approach is said to be the best approach where parties are not well represented and/or do not have equal access to resources. It is argued that the investigative approach is more likely to produce an outcome that is just. Brand J goes as far to suggest that where disputants are not represented, justice is not likely to be done if the adjudicator fails to call vital witnesses or ask pertinent questions not raised by the parties. In contrast, in an investigative hearing an adjudicator can ensure that all the relevant evidence is presented and tested thus ensuring or allowing for substantial and material justice.

The strengths of the investigative approach are what prompted the UK Justice Committee to recommend a 'stronger form of preliminary inquiry prior to the arbitration hearing in which the main issues could be clarified, statements of cases from the parties requested and essential documents requested and where possible agreed upon.'<sup>106</sup> It is debatable as to whether the South African approach can be described as 'investigative' or 'inquisitorial'. It has been suggested that section 138 (1) and (2) of the SA LRA, in giving substantial discretion to the arbitrator to the arbitrator to determine the procedure fairly and quickly and with minimal formality implies the primacy of the investigative approach.<sup>107</sup> C. Nupen, former Director of the CCMA, stated the following;

"In arbitration we are unlikely to be a court of record as the Industrial Court has been. It's time consuming and expensive. In the unfair dismissal arena, where in

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<sup>104</sup> Clark, *op. cit.* at 614

<sup>105</sup> *Ibid* at 614

<sup>106</sup> *Ibid* at 614

<sup>107</sup> *Ibid* at 618

many instances parties will not be represented by lawyers, the Commissioner may conduct the proceedings on an inquisitorial basis and elicit the facts and have to determine an approach to the facts once elicited. So there will be a different approach taken, but I think this is contemplated and intended under the statute.”<sup>108</sup>

In practice, however, it is alleged that the approach adopted by the CCMA commissioner has been largely adversarial and not investigative.<sup>109</sup>

The process as it exists in Botswana can best be described as largely investigative. The Industrial Court Rules allow for pre-hearing inquiries, statements of cases and other documentation. In the past trade unions (BFTU in particular) expressed concern over the fact that most workers were unable to afford legal representation, whereas employers were.<sup>110</sup> They further maintained that this provided for a distinct imbalance between workers and employers.<sup>111</sup> The investigative/inquisitorial approach of the Court, has, however, been said to reduce any disadvantages, real or perceived. It is also important to bear in mind that the degree or extent of the investigative approach used will depend on a number of factors such as the personality of the chair or judge. Because the Industrial Court of Botswana presently has three judges with distinct preferences and personalities, it is difficult to comment on the **degree** of the investigative approach employed in the Court.

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<sup>108</sup> Nupen C., (1996) , Charles Nupen of the CCMA, Preparing for Lift off Interview with Duncan Innes, *The Times Labour Brief* (7) 4 5-19 at 13

<sup>109</sup> Theron J & Godfrey S., op. cit. at 74

<sup>110</sup> See: Briscoe A., *Review of the Procedures for the Resolution of Industrial Disputes in Botswana*, p 30

<sup>111</sup> Ibid

#### 4.4 Formality: Documentation

The general rule regarding documentation, is that the greater the documentation, the greater the formality. In New Zealand, employees have the onerous task of writing to the employer before applying to the Tribunal.<sup>112</sup> In South Africa, however, it is fairly easy to make a complaint of dismissal. It has even been suggested that the system is too informal and accessible and has resulted in an influx of unfair dismissal cases before the CCMA<sup>113</sup> (many of which are alleged to not be genuine).

It is fairly easy to lodge a complaint in the Botswana Industrial Court. An applicant is required to bring a section 7 certificate and letter of referral to show that an attempt at conciliation had been made.<sup>114</sup> After that parties are required to complete standardized forms provided by the Court.<sup>115</sup> In the case of an urgent application, the procedure is slightly more onerous in that applicants are required to proceed by way of notice of motion and affidavit.<sup>116</sup> In as much as simplicity may be the desired ideal, it is also important to have stringent enough procedures that will prevent cases from being brought directly to the Industrial Court without an attempt being made to conciliate/mediate. Also of relevance is Rule 9 of the Industrial Court Rules relating to pre-hearing conferences which allows the Judge, Registrar and nominated members of the Court to call for documentation with a view to shortening or even settling cases.<sup>117</sup>

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<sup>112</sup> Corby S. & Newall I., op. cit. at 7

<sup>113</sup> Mosime K. op. cit. at 98

<sup>114</sup> Rule 4, Appendix C, *Industrial Court Rules*, op. cit.

<sup>115</sup> See: Appendix 1 & 2 (Applicants' Statement of case & Respondents' Statement of defence) in **Appendix C**, *Industrial Court Rules*

<sup>116</sup> See Appendix 3 (Notice of motion- Urgent application), in **Appendix C**, *Industrial Court Rules*, op. cit.

<sup>117</sup> Rule 9, Appendix C, *Industrial Court Rules*, op. cit. at p 11

#### 4.5 Formality: Appeals

The question of whether there is an appeal, is relevant to the issue of formality. It is important to note the levels of appeal and whether such appeal may be made on fact and/or law. In South Africa, there is no appeal from arbitration. The Department of Labour rationalized this by stating the following;<sup>118</sup>

“The absence of an appeal from the arbitrators award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs.”<sup>119</sup>

In Botswana cases emanating from the Industrial Court go on appeal twice a year to the Court of Appeal. A total of 20 cases have gone on appeal to the Court of Appeal with 3 cases presently awaiting the January 2002 Court of Appeal session.

**See: Table 2** below;

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<sup>118</sup> <http://www.labour.gov.za/docs.html>

Table 2<sup>120</sup>

NUMBER OF CASES APPEALED FROM THE INDUSTRIAL COURT

YEAR	Number of cases Registered	Number of cases appealed
1994	40	-
1995	118	4
1996	221	3
1997	92	6
1998	184	4
1999	266	3
2000	261	-
2001	199	3*

5. Awards

There is an increasing trend in the more industrialized and progressive nations towards granting increased monetary awards. Certain countries such as New Zealand, have removed all limits on the amount of monetary compensation that

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<sup>119</sup> Ibid

<sup>120</sup> Statistics on number of cases appealed from the Industrial Court obtained from the Industrial Court Registry, August 5, 2001.

\* NB. Court of Appeal sessions are only held twice a year. The next Court of Appeal session will be held in January, 2002. Consequently this figure is likely to change.

can be awarded for unjustified dismissal.<sup>121</sup> New Zealand has been particularly innovative in providing that the awards include in the quantum for damages amounts for humiliation, loss of dignity and injury to feelings.<sup>122</sup> In Great Britain the ceiling was previously defined in monetary terms, ie 18 600 pounds, which was said to be the average wage earnings for the year.<sup>123</sup> At present the government is said to be planning to raise the ceiling to reflect three years average earnings.<sup>124</sup>

Closer to home in South Africa, the maximum award that can be given in respect of unfair dismissal is 12 months pay or 24 months if the dismissal was found to be automatically unfair.<sup>125</sup> In Botswana the maximum compensation under section 24 (3) of the Trade Disputes (Amendment) Act of 1992 is six months.<sup>126</sup>

## 6. Conclusion

In spite of the initial legislative setbacks, the Court has proven to be reasonably accessible, speedy and informal in terms of its approach and style. Many of the delays initially experienced in the Industrial Court, were as a direct result of technical arguments raised in respect of the badly drafted TDA. Since the 1995 and 1997 amendments, however, very few legal arguments have been raised as *points in limine*. The Court has also adopted an approach whereby it sets down cases for hearing for **both** legal argument and the merits of the case.<sup>127</sup> After judgment has been reserved and the Court finds no merit in the technical

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<sup>121</sup> Corby S. & Newall I., op. cit at 9

<sup>122</sup> Ibid at 9

<sup>123</sup> Ibid at 9

<sup>124</sup> Ibid at 9 (See: *Employment Relations Bill*)

<sup>125</sup> Section 194 (2) & (3), 1995 SA LRA, op. cit.

<sup>126</sup> Section 24 (3), *Trade Disputes (Amendment) Act of 1992*, op. cit

<sup>127</sup> Interview with Industrial Court Judge D. de Villiers, July 16<sup>th</sup>, 2001, *Industrial Court, Gaborone, Botswana*

argument, it proceeds to deal with the merits in the judgment.<sup>128</sup> This approach ensures that there are no unnecessary delays that are brought about by technical legal arguments. See Table 3 below;<sup>129</sup>

**Table 3: INDUSTRIAL COURT CASES, JULY, 1994 – 31<sup>st</sup> JULY, 2001**

YEAR	#of cases registered	# of cases settled	# of cases withdrawn	# of cases pending hearing	# of cases pending judgment	# of cases abandoned by Applicants	# of cases decided
1994	40	4	-	-	-	7	29
1995	118	11	-	-	-	18	89
1996	221	24	16	-	-	29	152
1997	92	9	-	-	-	18	65
1998	184	26	6	-	2	14	136
1999	266	29	10	22	8	50	147
2000	261	37	19	36	11	43	115
2001	199	18	2	170	-	-	9

<sup>128</sup> Ibid

<sup>129</sup> Statistics on the Industrial Court cases from 1994-July, 31<sup>st</sup>, 2001 obtained from the Industrial Court Registry, 5<sup>th</sup> August, 2001, Gaborone, Botswana



The above table indicates the following trends;

- **Column two** shows an increasing number of cases being registered over the years. This is testimony of the relative accessibility of the Court and is also indicative of the increasing legitimacy and credibility of the institution.
- **Column three** demonstrates the Courts commitment towards promoting and facilitating settlement through pre-hearing conferences, as provided for in Rule 9 of the Industrial Court Rules.<sup>130</sup>
- **Column eight** generally shows an absence of case backlog, thereby demonstrating the Courts commitment to expediting cases. In spite of the Court only having one judge between 1994-1998, the Court was able to successfully avoid the build-up of a backlog of cases through the intermittent appointments of labour experts as Acting Judges.<sup>131</sup>

In general the above statistics show that the Court is not only conforming to the international best practice benchmarks and standards, but is also enjoying widespread legitimacy.

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<sup>130</sup> Rule 9, see: Appendix C, *Industrial Court Rules*, op. cit.

<sup>131</sup> Interview with Industrial Court Judge D. de Villiers, July 16<sup>th</sup>, Industrial Court, Gaborone, Botswana

## **CHAPTER SIX: Assessment of cases decided in the Industrial Court**

### **1. Introduction**

The Wiehahn Commission in South Africa in recommending the establishment of an Industrial Court, accepted that such a Court would “develop a body of case law which would by judicial precedent contribute to the formulation of fair employment guidelines”.<sup>1</sup> Industrial Courts are expected to consider aspects pertaining to socio-economic, political and extra-legal affairs. In addition, Industrial courts are expected to consider and incorporate principles of equity in their decisions. The objective of this section is to review the case law emanating from the Industrial Court with a view to assessing the principles laid down in the decisions. The facts will be set out and followed by a general analysis and commentary. The section will conclude with a general commentary. The section will conclude with general comments on the role played by the Court in the development of case law.

#### ***1.1 Michael Phirinyane v Spie Batignolles 1994<sup>2</sup>***

##### **Facts**

The Respondent, a French based building contractor, employed the Applicant as a welder to do on site welding. When there was no welding to do, the Applicant was required to remove refuse from the site and dump it. The Applicant was involved in an accident with the Respondents vehicle which he was driving on the 2<sup>nd</sup> of May, 1994. As the Respondent was of the opinion that the cause of the

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<sup>1</sup> Republic of South Africa, Commission of enquiry into Labour Legislation, Chairman: Professor N.E Wiehahn., Government Printer, Pretoria: 1979 (RP 47/1979), (hereinafter referred to as the ‘Report of the Wiehahn Commission’, para. 4.28.6, p 51

<sup>2</sup> *Michael Phirinyane v Spie Batignolles* IC 18/94

accident was the Applicants' gross negligence, he was summarily dismissed on the very same day. The dispute was reported to the district labour officer in terms of section 5 (1) (a) of the Trade Disputes Act. The district labour officer came to the conclusion that the Applicant had been **fairly** (emphasis mine) dismissed as he caused damage to the Respondents vehicle. The district labour officer was unable to negotiate a settlement and the Commissioner of Labour issued a certificate in terms of section 7 of the Trade Disputes Act that authorized the parties to refer the dispute to the Industrial Court.

### Decision

The Court made the following determination:

- 1) That the dismissal of the Applicant, Michael Phirinyane, by the Respondent on 2<sup>nd</sup> May, 1994 was unlawful and also procedurally unfair.
- 2) The Respondent was ordered to pay to the Applicant the sum of P633.60 as notice pay for unlawful dismissal.
- 3) The Respondent was ordered to pay to the Applicant the sum of P1267.20 being two months wages as compensation for procedurally unfair dismissal
- 4) No order was made as to costs<sup>3</sup>

In reaching its decision, the Court set out the guidelines for fair procedure for misconduct dismissals. In so doing, the court first set out the principles relating to serious misconduct (otherwise known as disciplinary dismissal).

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<sup>3</sup> *Michael Phirinyane*, op. cit.

### Serious Misconduct

The Court referred to section 26 (1) as read with section 26 (4) of the Employment Act, the relevant portions of which provide as follows:

s 26 (1) “Notwithstanding the other provisions of this part, the employer may terminate any contract of employment without giving notice of his intention to do so or making any payment such as is referred in section 19 (a) or (b) where the employee is guilty of serious misconduct in the course of his employment”<sup>4</sup>

s 26 (4) “ For the purpose of this section the term ‘serious misconduct’ shall. Without prejudice to its general meaning, include or be deemed to include the following-

- (a) willful disobedience of lawful and/or reasonable orders given by the employer;
- (b) willful express or implied, misrepresentation by the employee in respect of his skills or qualifications;
- (c) habitual or willful neglect of duties;
- (d) acts of theft, misappropriation or dishonesty against the employer, another employee, or a customer or client of the employer;
- (e) acts of violence;
- (f) damage caused willfully or by gross negligence to movable or immovable property of the employer;

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<sup>4</sup> Section 26 (1), *Employment Act*, op. cit.

- (g) willful disclosure of confidential information or trade secrets where such disclosure is or is likely to be detrimental to the interests of the employer;
- (h) inability to carry out normal duties, due to the consumption of alcohol or habit-forming drugs;
- (i) willful refusal to obey or comply with any safety rules or practices for the prevention or control of accidents or diseases;
- (j) consistent work performance below average despite at least two written warnings;
- (k) offering or receiving bribes;
- (l) persistent absence from work without permission.<sup>5</sup>

The Court went further to state that ‘although the Act does not prescribe any procedure to be followed by the employer before an employee is dismissed for misconduct, the rules of natural justice, however, dictate that in labour or industrial relations, when dealing with a misconduct dismissal case, there must be a fair and valid reason for such dismissal and to establish that, a fair procedure must be followed by the employer prior to dismissing such employee.’<sup>6</sup> The Court also set out the following cardinal requirements for a fair disciplinary hearing as follows;

- (a) The employee who faces discipline must be given reasonable notice of the time and place the employer intends holding a disciplinary enquiry.

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<sup>5</sup> Section 26 (4) (a)-(l), *Employment Act*, op. cit.

<sup>6</sup> *Michael Phirinayne*, op cit.

- (b) At the same time the employee must be informed of the nature of the charge or charges against him.
- (c) The employee must be given the option of being assisted or represented at the enquiry by a co-employee of his choice.
- (d) The employer should place sufficient evidence before the enquiry to prove that the alleged misconduct has been committed and that it has been committed by the employee so charged.
- (e) The employee should be entitled to question any witness who testifies against him.
- (f) The employee must be entitled to give evidence himself and to call his own witnesses.
- (g) In the event of being found guilty of the alleged misconduct, the employee must be given a further opportunity of putting forward facts in mitigation before a sanction is decided on.
- (h) If found guilty and after a sanction has been imposed, the employee should be informed of his right to appeal against such finding and/or sanction.
- (i) The enquiry should be conducted in good faith.

#### Commentary

The decision of the Court was especially significant to the development of labour relations in Botswana in that extensive guidelines were laid down with regard to appropriate disciplinary and dismissal procedures. The common practice that prevailed amongst employers was to dismiss employees with notice without any

reason. This was regarded as 'managerial prerogative'. Employers were also prone to dismissing employees just before the completion of their 60 months continuous service in an effort to avoid payment of severance pay benefits. In this decision, the court raised the issue of 'substantive fairness' and emphasized that an employer may only dismiss an employee by giving notice **if he has good reason** (emphasis mine). The Court further stated that such reason must be communicated to the employee. The decision was therefore especially welcomed by the Unions who saw it as a significant breakthrough in that, the Court not only established a precedent in terms of the appropriate procedure to be followed for misconduct dismissals, but also laid down principles that conformed to rules of natural justice and fairness.<sup>7</sup>

### 1.2 *Stanley Moyo v Kgolagano College* 1995<sup>8</sup>

#### Facts

The Applicant commenced employment on 7<sup>th</sup> March, 1994 with the Respondent as the Financial Administrator of the college, the Respondent being a college for theological education. The Applicant's letter of appointment stated that his monthly salary would be P 2 104, that he would be on probation for six months and that a copy of his conditions of employment and job description were attached. The Respondent had been sending out memo's to its teaching staff in 1993 (prior to the Applicants arrival) regarding amendments to their terms and conditions of employment. New terms were proposed in 1994 and the Applicant refused to sign a new contract of employment containing the new amended terms and conditions of employment. The Respondent, in the absence of such consent,

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<sup>7</sup> Interview, J. Motshwarakgole, E.M. Botsalano, M.H. Phokontsi, *National Amalgamated Local & Central Government and Parastatal Manual Workers Union*, July 20, 2001

<sup>8</sup> *Stanley Moyo v Kgolagano College* ; IC 33/95

nevertheless went ahead and implemented these new terms unilaterally. The Applicants contract was eventually terminated.

#### Decision

1. The Court found the termination of the contract of employment of the Applicant, Stanley Moyo on 20<sup>th</sup> September 1994 by the Respondent was wrongful and unfair.
2. In terms of section 25 (1) of the Trade Disputes Act, the Respondent was ordered to pay the Applicant the sum of P 1 400, being outstanding salary for September, 1994
3. In terms of section 25 (1) of the Trade Disputes Act, the Respondent is ordered to pay to the Applicant the sum of P 1 000 being outstanding leave pay.
4. In terms of section 24 (1) (a) of the Trade Disputes Act, the Respondent is ordered to pay to the Applicant compensation in the amount of P 12 620 (equivalent to the maximum compensation of 6 months)<sup>9</sup>

In deciding upon the matter, the Court made reference to the fact that the Industrial Court of South Africa had dealt with unilateral changes in terms and conditions of employment to establish whether it constituted an **unfair labour practice**. While the Court acknowledged the concept of 'unfair labour practice' to be germane to the South African LRA, it also acknowledged that the Court, in its determination of what constitutes an unfair labour practice, applied principles of equity.



In deciding whether there had been a unilateral change of contract, the court referred to the common law principles of contract. The Court stated the following;

“ As to the variation of contractual terms, the general rule is that terms and conditions of a contract of employment may only be varied with the consent of both parties. Under the common law no party has the right to vary or amend such terms and conditions unilaterally. If one party does so act, and it is not accepted by the other party, it amounts to a repudiation of the said contract.

There is however, an exception to this rule as regards contracts of employment. This is essentially because a contract of employment cannot remain static over the years, as some element of change is inevitable, which change according to the common law must be **mutually agreed by both parties** (emphasis mine). If an employee however, refuses to accept the change, the employer may according to the principles of equity, under given circumstances, unilaterally amend such terms and conditions of employment, because an employee cannot be allowed to exercise a power of veto over any such proposed amendments.”<sup>10</sup>

The Court ruled that there are certain requirements according to the **principles of equity** (emphasis mine) that have to be complied with. These are;

- (a) There must be a valid reason for the change; and
- (b) The change must be affected through a fair procedure.<sup>11</sup>

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<sup>9</sup> Stanley Moyo, op. cit

<sup>10</sup> Ibid

<sup>11</sup> Ibid

As regard 'fair procedure', there should be a 'commercial rationale' behind the amendment. In other words, it must be based on a 'rationalization of an economic, technical or structural nature, to render it substantively fair, and it must also not be illegal, as being in conflict with any statutory provision or unlawful, as being in conflict with a collective labour agreement.'<sup>12</sup> The Court further held that in as much as it is basically managements prerogative to amend terms and conditions of employment, the Court could never 'sanction any blatant implementation without allowing the employee to challenge this decision of management. There must be bargaining to deadlock and the employee must be allowed to resist any alteration in accordance with available conciliatory machinery, before it can be said that the unilateral amendment was fair. The Court relied on the South African cases of *Usher v Linvar (Pty) Ltd*<sup>13</sup> and *S. Pyatt & Ano. v Rand Mines (Mining and Services) Ltd*.<sup>14</sup>

#### Commentary

This decision was again welcomed by the unions, whereas management viewed it as an encroachment on its managerial powers. The decision warns employers to consult with employees before embarking on any economic, technical or structural changes that may affect the employees of the enterprise. This decision along with others played a major role in establishing the credibility of the Court in the eyes of trade unionists.

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<sup>12</sup> *Stanley Moya*, op. cit.

<sup>13</sup> *Usher v Linvar (Pty) Ltd*. (1992) 13 ILJ at 249 (IC)

<sup>14</sup> *S. Pyatt & Ano. v Rand Mines (Mining and Services) Ltd*. (1993) 4 (2) SALLR 48 (IC)

### 1.3 *George Mokaya v Morteo Condotte (Pty) Ltd. 1994*<sup>15</sup>

#### Facts

The Applicant was a citizen from Kenya. On the 15<sup>th</sup> October, he entered into a written contract of employment with Morteo Condotte (Pty) Ltd, which was an Italian Construction company contracted by the Botswana government to build roads. The Applicant was employed as a surveyor. The Respondent terminated the Applicant's services by handing him a letter dated 6<sup>th</sup> March 1993, giving him one months' notice of termination of service. The Respondent maintained that the basis for the termination was 'operational reasons' and accordingly attempted to justify the short notice of retrenchment.

#### Decision

The Court found the retrenchment to be substantively fair but procedurally unfair. The Court held that 'even when a retrenchment is substantively, if the correct procedure is not followed, such retrenchment will be procedurally unfair and it can result in the employer being ordered to pay compensation to such employee'.

The Court proceeded to set out the well-established guidelines regarding retrenchment procedures.

The Court referred to section 25 of the Employment Act. The said section touches on some of the retrenchment principles such as the LIFO principle, the giving of notice to all employees who will be affected by the decision to retrench, and prioritization of retrenched workers when work becomes available. The Court recognized that decisions taken by employers to economize

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<sup>15</sup> *George Mokaya v Morteo Condotte (Pty) Ltd.*, IC 6/94

are commercially based and within the realm of exclusive managerial prerogative.<sup>16</sup> The Court went further to set out the guidelines for retrenchment as follows;

- Should an employer decide in principle that retrenchment or any other method which will, or is likely to affect an employee is a possible way of achieving that result, then he must forthwith notify **all** (emphasis mine) such employees (or their representatives) of the possibility of retrenchment and the reasons for it.. Section 25 (2) of the Employment Act also requires that the Commissioner of Labour be notified.<sup>17</sup>
- The employer must consult with such employees or their representatives at the earliest opportunity. The reason for such consultation is threefold. Firstly for the parties to seek ways of avoiding or averting the need to terminate the employees' employment. Secondly, if retrenchment proves unavoidable, then the parties should consult on a fair selection criterion and thirdly consult on ways of alleviating the hardships caused by the retrenchments, eg a reasonable severance package, possible employment elsewhere, time off to seek alternative employment,<sup>18</sup> etc
- The employees should be given a fair chance to participate meaningfully in such discussions and be invited to propose reasonable alternatives to retrenchment, e.g. reduction in wages etc. In such consultations it is the duty of the employer to 'consult' and

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<sup>16</sup> *George Mokaya, op. cit.*

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

not necessarily 'negotiate'. If after fair and adequate consultations the parties still cannot reach agreement and they remain intransigent in their attitudes, then the employer is free to make the ultimate decision, as long as he acts fairly. The Court referred to the leading South African case of *NUMSA v Atlantis Diesel Engines (Pty) Ltd.*, where Fagan, DJ.P stated that "*Fairness in this context goes further than bona fides and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the Courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.*"<sup>19</sup>

- The normal and generally accepted criterion is the LIFO principle.

<sup>20</sup>Section 25 of the Employment Act also provides for this criterion to be adopted "wherever reasonably practicable", taking into account;

- (i) the need for the efficient operation of the undertaking in question; and
- (iii) the ability, experience, skill and occupational qualifications of each employee concerned."<sup>21</sup>

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<sup>19</sup> *NUMSA v Atlantis Diesel Engines (Pty) Ltd.* (1993) 14 ILJ 642 (LAC)

<sup>20</sup> Last in, First out principle. See also: Section 25, *Employment Act*, op. cit.

<sup>21</sup> Section 25, *Employment Act*, op. cit

### Commentary

The decision of the court had significant implications to the development of labour relations in that;

- it emphasizes that companies are expected to adhere to equitable retrenchment procedures;
- it again emphasizes the importance of consultation between employers and employees in matters of economic and structural change.

Once again, this decision was welcomed by the trade unions. NALCGWU in particular, embraced the decision and submitted the following statement;

*"One of the greatest challenges facing the trade union movement today, is loss of jobs. We appeal to government to tighten the labour laws and make it difficult to retrench. This can be done by, among other things, elevating the equitable principles, laid down by the Industrial Court from time to time into statutory provisions".<sup>22</sup>*

#### **1.4 Morupule Colliery Ltd. v Botswana Mining Workers Union 1995<sup>23</sup>**

### Facts

The Applicant operates the Morupule Colliery in Palapye, which is the only colliery in Botswana. The majority of coal consumed in Botswana is supplied by this colliery. One of the Applicant's biggest consumers is the Botswana Power Corporation (BPC) which is listed as an essential service and supplies over 80%

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<sup>22</sup> National Amalgamated Local & Central Government and Parastatal Manual Workers Union, *Position Paper on Some Aspects of Labour Legislation that Need Immediate Attention*, unpublished paper, 19<sup>th</sup> Sept., 2000, at p 5

<sup>23</sup> *Morupule Colliery Ltd. v Botswana Mining Workers Union* IC 4/95

of Botswana's electricity. The colliery also supplies electricity to three of Botswana's vital industries, namely; Soda Ash Botswana (Pty) Ltd, which produces soda ash for making paper and glass, Botswana BCL Ltd. Which mines copper and nickel, for use in its furnaces and to Botswana Meat Commission.

The Applicant, Morupule Colliery Ltd. brought an urgent application to the Industrial Court against Botswana Mine Workers Union in which an order was requested in terms of section 18 (1) (b) of the Trade Disputes Act to *inter alia*, enjoin employees of the Colliery who were members of the Union, from continuing the strike action they had embarked upon on 9<sup>th</sup> January, 1995. In the application, the Court was also asked to declare the strike action unlawful and unprocedural.

#### Decision

The Court granted the aforesaid orders for reasons set out below;

In dealing with the lawfulness of the strike, the Court stated that 'employees in *essential services* (emphasis mine) (who) want to embark on lawful strike action or any other lawful industrial action, first have to comply with the provisions of Section 43 of the Trade Disputes Act. Should they fail to comply with such provisions, any ensuing strike action will be unlawful....' The Court also made the observation that there seemed to be some confusion about strike action in non-essential services because the Act did not contain any prerequisites for lawful strike action in non-essential services. The Court noted however, that the Legislature did contemplate and provide for strike action in sections 34-39 of the TDA.<sup>24</sup> In setting out the procedure to be followed regarding strike action in

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<sup>24</sup> Sections 34-39 deal with unlawful strike action, *Trade Disputes Act*, op. cit.

non-essential services, the Court had regard to the ‘definition’ of a strike as found in section 2 of the TDA. Section 2 of the said Act provides that;

- *“Strike means the cessation of work by a body of employees in any trade or industry acting in combination or under a common understanding or a concerted refusal or a refusal under a common understanding by such body of employees to continue to work”*<sup>25</sup>

The definition must be read in conjunction with the following definition in Section 2 of **“industrial action”**:

- *“industrial action means a lock-out, strike or action short of a strike in furtherance of a trade dispute.”*<sup>26</sup>

The Court therefore, observed that industrial action embarked upon by employees in non-essential services would only be *lawful* if it was in *“furtherance of a trade dispute”*. The Court referred to the definition of a trade dispute as contained in section 2 of the TDA and proceeded to consider the question of *‘who can declare industrial action unlawful’*. **“Unlawful industrial action”** is defined in section 2 of the Act as;

- *“.....any industrial action declared by this Act or by the Minister under this Act to be unlawful or any lock-out, strike or action short of a strike deemed to be unlawful industrial action by virtue of section 36.”*<sup>27</sup>

The abovementioned definition considers three possibilities in which unlawful industrial action may come about;

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<sup>25</sup> Section 2, Interpretation section of the *Trade Disputes Act*, op. cit.

<sup>26</sup> Ibid

<sup>27</sup> Ibid



(A) Firstly unlawful industrial action may be deemed unlawful in terms of section 36 of the Act which provides that; *"Any lock-out, strike or action short of a strike intended or calculated to compel or influence any employer not to employ or continue to employ a person on the ground that he is not a member of a trade union or that he is or is not a member of a particular trade union shall be deemed, for the purpose of this Act, to be unlawful industrial action."*<sup>28</sup>

(B) Secondly the Minister may declare any industrial action unlawful in terms of section 34 and 37 (1) of the TDA. Section 34 provided that: *"Where it appears to the Minister that there is actual or declared industrial action in furtherance of a trade dispute, whether existing or apprehended, and he is satisfied that all practicable means for reaching a settlement of the trade dispute, by way of the procedures prescribed by a collective labour agreement or by this Act, have not been exhausted, he may, by order, declare the industrial action to be unlawful."*<sup>29</sup> Section 37 (1) deals with the Ministers powers to declare industrial action unlawful where there is a collective agreement or a decision of the Industrial Court.<sup>30</sup> The relevant portions of that section provide that:

*"(1) Where it appears to the Minister that there is actual or declared industrial action in furtherance of a trade dispute, whether existing or apprehended, in any trade or industry and he is satisfied-*

*(a) that the matters to which the trade disputes relates have been settled: by a collective labour agreement or by a decision of the Industrial Court;*

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<sup>28</sup> Section 36, *Trade Disputes Act*, op. cit.

<sup>29</sup> Section 34, *Trade Disputes Act*, op. cit.

<sup>30</sup> Section 37 (1) (a)- (c), *Trade Disputes Act*, op. cit.

(b) *that a substantial proportion of the employers and a substantial proportion of the employees in that trade or industry are, either directly or through their respective organizations, bound by the agreement or decision; and*

(c) *that the agreement or decision or agreement remains in force, the Minister may-*

(i) -----

(iii) -----

(iii) -----

(iv) *by order declare the industrial action to be unlawful until such date as shall be specified in that order."*

(C) Thirdly, any industrial action may be declared unlawful in terms of the said Act.

The Court also found that in terms of section 18 (1) (b) of the TDA, it had the jurisdiction to "*enjoin any employee or employer, or any trade union or employer's organization, from taking or continuing any industrial action.*" Consequently, the Court can interdict any industrial action, and therefore also a lawful strike. The Court then, reasoned that by virtue of being able to interdict a lawful strike, it can surely declare **any** (emphasis mine) industrial action unlawful. The Court referred to section 18 (1) (b) as read with section 17 (1) and the definition of '*unlawful industrial action*' as contained in section 2. It found that the wording of section 17(1), dealing with the purpose for which the Industrial Court was established, showed that the intention of the Legislature was to give the Court the power to declare any industrial action unlawful. The Court finally held that the only way it could achieve its purpose set out in section 17(1), being to '*further, secure and*

*maintain good industrial relations in Botswana* is by having power to declare industrial action unlawful. The Court consequently found that it had such power.

#### Commentary

Prior to this Industrial Court decision the law relating to industrial action had been considered complex and unclear. The decision of the Court was largely welcomed by all, in so far as it provided clarity regarding the procedures to be followed in instances of strike action.

#### **1.5 *Kedibonye Ben & Ano. v Green Industrial Enterprises Corporation (Botswana) (Pty) Ltd.* IC 20/95**

##### Facts

The two Applicants worked for the Respondent on the Francistown Northline Project; one as a plumber foreman since August, 1987 and the other as a concrete foreman, since March 1988. Both Applicants fell ill with similar lung problems and requested sick leave. Whilst on sick leave, the two were dismissed from work. The Applicants maintained that they were dismissed for reasons of ill health, while the Respondent submitted that the Applicants had been retrenched.

##### Decision

The Court found that 'no acceptable reason had been given by the Respondent for the 'said' retrenchment.' The Court also found that 'the two Applicants' had in fact been dismissed by the Respondent, who used retrenchment as a **guise, (emphasis mine)** to try and justify such dismissal.' The Court awarded the First Applicant three months wages and the Second Applicant two months wages as compensation for unfair dismissal.

The Court also addressed its mind to the issue of severance benefits and the method of calculation of such benefits. The Court referred to section 28 as amended by act 26 of 1992. Subsections 28(1) and (2) provide as follows:

*28(1) Without prejudice to section 31, on the termination of a contract of employment, whether by reason of the death or the retirement of the employee or for any other reason, the employer shall pay to an employee who has been in continuous employment with him for 60 months or more, a severance benefit at the rate prescribed; provided that-*

*(i) severance benefit shall be payable at the conclusion of each period of 60 months continuous service by the employee, or at the termination of his employment, at the option of the employee;*

*(ii) where, upon the date of payment of any severance benefit, the employee, or his dependent or beneficiary, is at that date or some future date entitled to the payment of a gratuity and pension in respect of the period of employment under the contract, no severance benefit which would otherwise be payable in terms of this section to the employee or his dependent or his beneficiary shall be payable; and*

*(iii) where the continuous employment began at any time before the commencement of this Act, that employment shall be deemed, for the purposes of this section, to have begun at the commencement of this Act.*

*(2) For the purposes of calculating the severance benefit payable in accordance with this section-*

*(a) in subsection (1)- (i) 'month', in relation to the first 60 months of continuous employment, means a complete month and, in relation to continuous employment thereafter, means a complete month or any fraction thereof; and*

*(ii) 'basic pay' means the basic pay payable to the employee at the*

*time of the termination of the contract of employment; and*

*(b) where, at the time of the termination of the contract of employment, any leave is due to the employee or he has any other right of absence under this Act, the period of that leave or other right of absence shall be deemed to be part of his period of continuous employment."*

The Court also set out the rate prescribed for a severance benefit as contained in Regulation 2 A of the Employment (Miscellaneous Provisions) Regulations, published in the Government Gazette on 20 November 1992. The regulation provides as follows:

2A " For the purposes of section 28 (1) of the Act the severance benefit to be paid on the termination of a contract of employment shall be at the rate of one days' basic pay in respect of each of the first 60 months of continuous employment and two days basic pay in respect of each additional month of continuous employment'.

The Court interpreted subsection 28 (1) and its provisos as stipulating, that severance benefit is not only payable on the termination of a contract of employment, but is also **payable at the conclusion of each period of 60 months continuous service with the same employer.** (emphasis mine). The Court also analyzed subsection 28 (2) (a) (i) and found that the legislature had made provision for two separate situations. In the first instance, the first period of 5 years a 'month' means a complete month, which means that for an employee to qualify for his first severance benefit he must have 60 complete months of continuous employment. Secondly in relation to further periods thereafter, the Court found that a 'month' means a complete month or any fraction thereof. The Court found that this clearly indicated that **'a second or further period need not be 60 complete months'** (emphasis mine). The Court accordingly held that the Applicants were entitled to a further *pro rata* severance benefit for every

additional month and any fraction of a month of continuous employment after their first 60 months of continuous employment.

#### Commentary

The decision was of major significance in that it set out the procedure to be followed in the calculation of severance pay. Even more importantly it established the principle that severance pay is payable at the conclusion of every 60 months service and further that severance pay could be calculated on a *pro rata* basis.

#### **1.6 *Botswana Diamond Sorters Valuers Union v Botswana Diamond Valuing Company* IC # 213/2001**

#### Facts

The Applicants in the matter, BDVC Union went on strike at the Respondents premises between the 14<sup>th</sup> of August until the 17<sup>th</sup> of August, 2001. On the 17<sup>th</sup> of August the Applicants brought an urgent application before the Industrial Court requesting the Court to issue a rule *nisi* in the following terms;

- (1) Declaring that the sit-in and mass gathering and/or work stoppage ('the Industrial Action') by the Applicant held on Tuesday the 14<sup>th</sup> August, 2001 is not in breach of the provisions of the Trade Disputes Act (Cap. 48:02) and is therefore not illegal and/or unlawful;
- (2) Interdicting and restraining the Respondent from dismissing Applicant's members who are embarking on lawful industrial action;
- (3) That the order set out in the (above) paragraphs ...operate as an interim interdict with immediate effect, pending the final determination of this application.

### Decision

The Court in granting the rule nisi, made a preliminary finding that the Respondent's business was not an essential service in terms of the Trade Disputes Act. The Court also found that the 'strike action embarked on by the Applicants members on the 14, 15, 16 and 17 August, 2001 at the Respondents premises was for the purpose of furthering a trade dispute, namely a grievance regarding the 2001 wage increases, which falls within paragraph (b) of the definition of 'trade dispute' in section 2 of the Trade Disputes Act.' Consequently the Court found the strike action to be a lawful strike. On the 19<sup>th</sup> August, 2001, the Court directed that the rule nisi issued on the 15<sup>th</sup> August, 2001 be discharged. The Court found that the parties had not made sufficient attempt to reach agreement regarding the said 2001 wage increases. The Court therefore, found the strike action embarked upon by the Applicants' members to have been premature and non-functional and accordingly declared the strike action unlawful. The Court also directed, in terms of section 20 (2) of the Trade Disputes Act, that the dispute be remitted to the parties for purposes of enabling the parties to, 'engage in **proper, constructive and meaningful collective bargaining** (emphasis mine) regarding the said 2001 wage increases'. The Court further directed that;

- In the event of the parties not reaching agreement on the said dispute, they are hereby directed and ordered to refer the said dispute to the Commissioner of Labour for mediation in terms of section 5 (1) of the Trade Disputes Act;
- During the said collective bargaining and pending the Commissioner of Labour's recommendation on the said dispute:

- (a) The Respondent is hereby directed and ordered not to take any disciplinary action against the Applicant's members regarding the said strike action;
- (b) The Applicant's members in the employ of the Respondent are hereby directed and ordered not to embark on any industrial action.

#### Commentary

This decision of the Industrial Court is significant for the following reasons;

- It illustrates the power of the Court regarding its ability to declare strike action illegal;
- It illustrates the Courts' high regard for the collective bargaining process. The decision also reflects the 'non-interventionist' approach adopted by the Court with regard to the collective bargaining process;
- It emphasizes the Courts' support of conciliatory and mediatory processes.

The decision is likely to be well received by employers who have tended to view the Industrial Court as an institution that is biased towards workers and unions. The decision may also influence the unions to take the collective bargaining process more seriously and to refrain from bringing 'premature or frivolous' actions before the Court.



## 2. Conclusion

To a certain extent, the decisions of the Industrial Court reflect the uncertainty and anomalies of the legislature as set out previously in chapter four of the study. As previously stated, the legislative amendments made between 1992 and 1998, have generally empowered the Court to function more effectively as is evidenced by the rapidly increasing cases reflected in **Table 3**. In general, the Court can be seen to have established itself, through its decisions, as a Court of equity and fairness.

Certain trends and guidelines have emerged from the Industrial Court decisions. Of particular importance are the following guidelines relating to employment practices;

### Dismissal and Discipline

- An employer should ensure that they have dismissal and disciplinary procedures that are fair and adhered to.
- Disciplinary measures should provide for written warnings and should adhere to the *audi alteram partem* rule by allowing an employee to be made aware of any impending action against him/her and be given ample opportunity to state their case and be represented.
- On managerial prerogative-The Court has clearly not supported the idea of unlimited or unbridled managerial prerogative. The Court has also, in its decisions, rejected unilateral decision-making that affects the rights and interests of employees. Decisions of the Court have emphasized the need for management to consult with employees or

their chosen representatives before taking any action(s) that may affect them.

- On retrenchment- The Court has on numerous occasions stated that retrenchment procedures should be fair and consistently adhered to. Failure to adhere to the said principles, even where there is good cause, will result in the retrenchment being held procedurally unfair. The Court has also shown that it will not tolerate employers who use retrenchment as a 'guise' to remove certain 'unwanted employees'. The Court has also shown that it will not tolerate employers who unfairly dismiss or 'retrench' employees in a bid to avoid payment of severance benefits.
- On collective bargaining- The Court has sent a clear message that it supports the collective bargaining process, and will therefore not intervene prematurely

## **Chapter Seven: Perceptions of the Industrial Court**

### **A. Introduction**

This chapter sets out the views and attitudes expressed by a particular sample of interviewees listed in Appendix A towards the Industrial Court. The format of the interview schedule is set out and followed by the responses of interviewees according to their individual grouping.<sup>1</sup>

### **B. Interview Schedule & Responses**

#### **Question 1.**

##### **1. Industrial Court Rules & Procedure**

The ILO has stated that an effective dispute resolution system must be speedy and efficient. Please comment on the Botswana Industrial Court procedures having specific regard to the following;

- 1.1 Complexity- Are the rules and procedures user friendly? Are the rules practical and informal whilst allowing each party to fully state its case and explain fully its position in the dispute?

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<sup>1</sup> Refer to Chapter One at 2.7 with regard to the following methodology;

- construction of interview schedule;
- structure of interview schedule;
- choice of interviewees.

See also: Chapter One at 3., on the limitations of the report

1.2 Timeliness

1.3 Technical arguments/legal representation- Many of the arguments before the Court are legal arguments. What is your view on technical arguments that result in long delays?

1.4 Costs

Academics

- (a) Complexity- All of the academics felt that the rules were both informal and user-friendly. Most felt that the rules addressed the needs of the parties. One academic felt that the rules were 'almost moving towards the cumbersome and technical side'. He emphasized the need for simplicity and felt that the rules should leave room for discretionary functions.
- (b) Timeliness- All the academics felt that the time limitations were accommodating enough, more especially since the Court has the discretion to condone late applications. One academic emphasized that the Court should not be under any pressure to conclude a matter.
- (c) Technical arguments- All of the academics felt that technical arguments cannot be avoided for the simple reason that the Court has to deal with the interpretation of statutes. One academic stressed that while the Court should not be bogged down by technicalities, the Court should also create room for lawyers to come in and offer expert advice.
- (d) Costs- All academics lauded the Industrial Courts approach to costs in that most of the parties seeking redress from the Court had been unfairly

dismissed and consequently were not able to bear any additional financial costs.

#### Labour Lawyers

- (a) Complexity- All of the labour lawyers felt that the rules were user-friendly. All felt that the rules were relatively simplistic and much less formalistic than the High Court Rules. The lawyers lauded the Courts approach as being extremely informal and noted several instances where the Court did not confine itself to the pleadings before it and often sought further details not included in statements of case. One labour lawyer expressed the view that the Industrial Court Rules should be given Rule status so as to give the Court sufficient power for enforcement.
- (b) Timeliness- All the labour lawyers felt that the Industrial Court had a 'distinguished culture of time-keeping' which ultimately helps in 'speeding up the resolution of cases'. All agreed that matters before the Industrial Court were concluded in considerably less time than matters before the High Court. All labour lawyers, however felt that there was room for improvement. One lawyer suggested that delays in the handing down of judgments in the Industrial Court could further be reduced by the reduction of the judges workloads and sitting time. Another lawyer suggested that many attorneys take advantage of the Courts liberalism in condoning late applications. It was suggested that the Court exercise a more strict approach in condoning late filing, especially with regard to Respondent statements of defence. A suggested approach was that the Court only condone late filing in '*compellingly exceptional circumstances*'.
- (c) Technical arguments- All labour lawyers felt that technical arguments were inevitable in that the Industrial Court is a court of equity and **law**. All agreed

that legal representation should be allowed as it enriches the jurisprudence of the Court and helps the Court reach a final decision. One lawyer, however submitted that there are certain absurd technical points that are raised. He further submitted that a proviso should be drafted to prevent the submission of 'frivolous and vexatious' submissions.

- (d) Costs- All the labour lawyers acknowledged that the Court had established a general precedent of not awarding costs. Sixty six percent of the lawyers agreed with the Courts present approach and felt that costs should be awarded where there was a 'patent abuse of the court process'. The remaining thirty-three per cent, felt that the Court needs to be more robust in its attitude to awarding costs so as to restrict the number of 'unnecessary cases' coming before the Court. This particular group felt that many of the cases that come before the Court would not if there was a 'cost consequence'

#### Management Personnel

- (a) Complexity- All the management personnel were of the opinion that the Industrial Court procedures were simple to use and user friendly. One of the employer officers recommended that the rules be interpreted into one or more of the indigenous languages of the country to make them more user-friendly.
- (b) Timeliness-All members of management felt that the matters were concluded in the Industrial Court within a 'reasonable' time frame.
- (c) Technical arguments-All management officers expressed the view that technical arguments before the Court did not result in unnecessarily long delays. One of the officers emphasized that the Court dealt with any technical arguments that arose before it as expeditiously as possible.

- (d) Costs- All the management officers felt that any costs incurred at the Industrial Court were 'manageable'.

Trade Unionists\*<sup>2</sup>

- (a) Complexity- All trade unionists expressed satisfaction with the establishment of the Industrial Court and its procedures. They used the High Court as their basis of comparison and felt that the Industrial Court was much less formal. In their opinion the Industrial Court was 'doing its job'. The NALCGPWU, in particular felt that the ordinary courts had not been particularly helpful in providing its members with the relief sought and therefore welcomed the Industrial Court with its specialized knowledge of labour law and procedures.
- (b) Timeliness- All the trade unionists felt that the Court was not expeditious enough in handing out its written judgments. Most felt that this was due to the shortage of Judges and Industrial Court professional staff in general. Trade Unionists felt that the appointment of more judges would be helpful. They further emphasized that it was important that appointed judges be acquainted and familiar with labour law.
- (c) Technical arguments- Most of the trade unionists felt that technical arguments could not be avoided since the 'concept of democracy allows for legal representation'. The BFTU, however argues that many of the arguments before the Court that are technical in nature require legal representation.<sup>3</sup> The Union further argued that in most instances, the employee cannot afford such representation, whereas most employers can.

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<sup>2</sup> \* Please note that the responses submitted by the union are largely representative of one Union, namely NALCGWU. All attempts to illicit responses from other unions proved futile.

<sup>3</sup> Briscoe A, op. cit. at 30

The Union maintains that this ultimately gives the employer an unfair advantage over the employee.<sup>4</sup>

- (d) Costs- All trade unionists were satisfied with the Courts approach in awarding costs. They further expressed satisfaction with the fact that any individual can appear before the Industrial Court and get relief. In their opinion justice before the IC was both inexpensive and accessible.

### **Question 2-Industrial Courts Jurisdiction & Status**

2. Please comment on the jurisdiction of the Industrial Court with specific regard to the following;

- 2.1 Exclusive jurisdiction- What is your viewpoint on the dual jurisdiction exercised by the ordinary courts and the Industrial Court?
- 2.2 Disputes of right/ Disputes of interest- The Trade Disputes (Amendment) Act is silent on the question of whether the Court should deal with disputes of interest. Should the Court be empowered to deal with disputes of interest?
- 2.3 Awards/ Compensation

### **Academics**

- (a) Exclusive jurisdiction- Labour academics disagreed on the question of the dual jurisdiction exercised by the ordinary courts and the Industrial Court. The majority felt that it was appropriate, more especially since the Industrial

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<sup>4</sup> Ibid at 30



Courts power to award compensation was limited. The remaining individual felt that the purpose of the Industrial Courts existence was being defeated.

- (b) Disputes of right/Disputes of interest- All labour academics felt that the Industrial Court should be empowered to deal with disputes of interest.
- (c) Awards/ Compensation- Fifty per cent of labour academics were satisfied with the awards given by the Court, whilst the remaining fifty per cent, felt that the restrictions placed on the Court by section 24 of the 1992 Trade Disputes (Amendment) Act were unreasonable. Most felt that the six months maximum award restriction was unreasonable and most advocated for the removal of the restriction. All academics submitted that there must be a **reasonable** (emphasis mine) limitation.

#### Labour Lawyers

- (a) Exclusive jurisdiction- All the labour lawyers felt that the Industrial Court should be given '**exclusive jurisdiction**' in labour matters since it is a **specialized court** with more 'streamlined and user-friendly procedures'. All of the lawyers felt that the Industrial Court has established a culture of equity which includes incorporating ILO Conventions and established labour relations principles. Lawyers also expressed concern that the dual jurisdiction currently being exercised, has the effect of providing for two different streams of labour law judgments and further runs the 'risk of conflicting decisions'. This is particularly so, since the ordinary courts tend not to use equitable principles used by the Industrial Court. The lawyers further submitted that a lot of uncertainty will be created if the two forums are allowed to 'pronounce differently and emphasize differently'. Ultimately this will hamper the development of law. The lawyers maintained that in the

interests of consistency, certainty, and development of law, the Industrial Court must be given exclusive jurisdiction.

One of the labour lawyers further submitted that labour law cannot be separated from constitutional law. He maintains that freedom of association rights overlap with constitutional issues. Consequently, he suggested that the Industrial Court be given **concurrent jurisdiction** with the High Court on constitutional issues.

- (b) Disputes of right/ Disputes of interest- On this issue, labour lawyers were divided. Most felt that the Court should not determine pay increases. This group of lawyers felt that such disputes should be left to the parties to resolve through either alternative dispute resolution procedure, or where necessary, through industrial action. The remaining individual felt that the Court should be empowered to deal with disputes of interest only if judicial officers have been afforded the necessary training. In his view, the evaluation of expert evidence regarding wages requires sound knowledge of financial and economic issues.
- (c) Awards/Compensation- All labour lawyers agreed that the six months maximum award given to the Court under section 24 of the TDA was far too restrictive. Different opinions were expressed on the appropriate amount to be awarded. One lawyer was concerned that the Industrial Court should not be viewed by employees as a 'cash cow' and therefore suggested a 12 months salary maximum. Another lawyer suggested a 24 months ceiling, similar to the one established under the SA LRA. It was further suggested that the Court be given the power to award damages (ie general and specific damages). All lawyers emphasized that in making an award, the court must take relevant circumstances into account.

### Management Personnel

- (a) Exclusive jurisdiction- All management officers emphatically stated that the Industrial Court should be given **exclusive** jurisdiction to deal with labour matters as it is a specialist Court. Management officers shared the view that the ordinary courts were not 'particularly familiar' with labour matters.
- (b) Disputes of right/ Disputes of interest—Only one management officer felt that the Industrial Court should be empowered to deal with disputes of right and **interest**.
- (c) Awards/Compensation- All the management officers felt that the six month maximum compensation awarded to the Court was sufficient,

### Trade Unionists

- (a) Exclusive jurisdiction- The trade unionists also felt that the Industrial Court should have exclusive jurisdiction. NALCGPWU made a submission to the Parliamentary Committee to advocate for the Industrial Court to be given **exclusive jurisdiction**. In its submission before the Parliamentary Committee, the Union argued that the dual jurisdiction currently being exercised by the Courts is resulting in confusion and **forum shopping**, whereby litigants can choose whether to go to the High Court or the Industrial Court. The Union accordingly requested that the Industrial Court as a Court of equity be given exclusive jurisdiction. The union further advocated for the establishment of a Labour Court of Appeal.
- (b) Disputes of right/ Disputes of interest – All of the trade unionists were of the view that the Industrial Court should be empowered to deal with disputes of interest, especially where there seems to be an injustice.

- (c) Awards/Compensation- Whilst most of the trade unionists expressed satisfaction with most of the awards given by the Court, many felt that the six month restriction imposed on the Court was too little. All of the trade unionists expressed a desire to see an increase in the Courts discretion to award compensation.

### **3. Status of the Industrial Court**

#### Question three

Please Comment on the status of the Industrial Court vis-a vis that of the High Court:

#### Academics

Status of the IC- None of the academics were satisfied with the status of the Industrial Court as it presently exists. All of the academics expressed the view that the IC's status should be enhanced to enable it to have full powers to function properly. One of the academics suggested that the Industrial Court should be able to rule on constitutional issues. Another academic recommended that the Industrial Court should exist as a specialized branch/division of the High Court that deals only with trade disputes.

#### Labour lawyers

Status of the IC- All of the labour lawyers fully supported the upcoming referendum on the status of the Industrial Court.

### Management Personnel

Status of the IC- All the management officers expressed a desire to see the Industrial Court being given the same status as the High Court. One officer in particular, felt that the Industrial Courts inferior status was partly attributable to the fact that the Court fell within the mandate of the Ministry of Labour and Home Affairs.

### Trade Unions

Status of the Industrial Court- All the trade unionists expressed a desire to see the Industrial Court being on par with the High Court. NALCGPWU in particular, stated that they will be embarking on a campaign to educate their workers on the upcoming referendum to be held on October 6, 2001 on the status of the IC. The Union also stated that they will also advocate for that their members vote for the referendum to be passed.

## **4. Collective Bargaining Process**

### Question 4

- 4.1 How would you describe the Industrial Courts' role in the collective bargaining process? Would you say it was interventionist in nature or not?
- 4.2 Does the existence of the Industrial Court have any effect on the collective bargaining process at all, ie; Does it facilitate or promote voluntary settlement?

### Academics

- (a) All of the academics felt that the IC was non-interventionist in nature. One of the academics emphasized that the Court must fulfill its adjudicatory role and in so doing must act as a facilitator. The Court should therefore act as an 'overseer providing assistance to the parties'. Any intervention by the Court should be minimal.
- (b) All of the academics felt that the mere existence of the Court promoted fair and voluntary settlement. Parties were often more prone to settling because they realized that their position may be challenged in the IC.

### Labour lawyers

- (a) None of the labour lawyers were of the view that the IC role in the collective bargaining process was interventionist in nature. One of the lawyers expressed the view that the contribution of the IC lies in its pronouncements which have given trade unions some leverage in the collective bargaining process. Some of the IC's judgments defined issues of 'consultation and negotiation' and in so doing extended the parameters of the collective bargaining process.
- (b) All the labour lawyers answered the question in the affirmative. Some of the labour lawyers expressed the view that the IC has provided a wealth of jurisprudence and case law. This in turn means that a properly advised union and employer organization are more likely to settle. One lawyer expressed the view that settlement may sometimes occur for the wrong reasons, ie, an employer may decide to settle for financial reasons. It was also suggested that the existence of the Court has encouraged settlement in the cases of illegal

strikes where applications for interdicts were issued. It is maintained that this action by the Court has tended to concentrate the minds of the parties.

#### Management Personnel

- (a) All management officers expressed the view that the Industrial Court was largely non-interventionist in nature.
- (b) All management officers felt that the Industrial Courts existence encouraged voluntary settlement.

#### Trade Unions

- (a) All of the trade unions were of the view that the Court was largely non-interventionist in its approach to the collective bargaining process.
- (b) All of the trade unions felt that the mere existence of the IC facilitated voluntary settlement as employers now knew that employees had a proper forum for relief.

### **5. Usage of the Industrial Court**

#### Question 5

Please give your viewpoint regarding the usage of the Court by;

- 5.1 Unions
- 5.2 Employers/Management
- 5.3 Do you think the Court enjoys widespread legitimacy?

### Academics

- (a) All the academics felt that the Unions are using the Court more and more as they realize that they have a place to take their disputes.
- (b) All the academics expressed the view that employers showed an initial reluctance to use the Court. Most of the academics, however felt that the IC was beginning to have an impact even on employers.
- (c) The academics felt that the Court is beginning to enjoy widespread legitimacy. One of the academics stated that the governments initial efforts to establish the Court were half-hearted and resulted in a hampering of its initial growth. All the academics expressed the view that the Court particularly enjoyed widespread legitimacy amongst dismissed employees and aggrieved trade unions.

### Labour Lawyers

- (a) All of the labour lawyers agreed that the Unions are beginning to use the IC much more. One of the lawyers expressed the view that in the early days of the Courts establishment, many of the unions' applications before the Court failed due to the legal and technical problems of the Trade Disputes (Amendment) Act. Consequently, the unions may have formed a false perception that the Court was biased towards the employers. All of the lawyers agree that the Industrial Court is presently much more favoured by the Unions than the High Court for reasons of its relative informality, speed and cost effectiveness. The Courts reference to ILO Conventions has also inspired confidence in Unions. One of the lawyers stated that in general, unions tend to approach the Court over the more complex issues. Where the



matter is straightforward, the unions do not usually bother to access the Court.

- (b) All of the labour lawyers felt that employers are still to a large extent, uncomfortable with the equity jurisdiction of the Industrial Court. Employers tend to use the Court widely for dealing with matters involving industrial action. Apart from that employers normally participate in the court process as Respondents.
- (c) All of the labour lawyers felt that the IC enjoyed widespread legitimacy amongst employees and the unions. Employers, however, seemed to still carry certain reservations with regard to the Courts legitimacy. One of the lawyers emphasized that the medium to small businesses felt 'bewildered and besieged' and felt that the Industrial Courts approach was 'unrealistic and uncommercial'. Many of the employers also feel that they have been 'bushwacked' by the introduction of procedures that do not appear in the Employment Act and can only be found in judgments that they are not equipped to disseminate.

#### Management Personnel

- (a) All the management officers were of the view that Unions were beginning to use the Industrial Court more.
- (b) All of the management officers also agreed that employer usage of the Court was minimal.
- (c) Sixty-six per cent of management officers felt that the court enjoyed widespread legitimacy. One of the officers, however qualified his answer to say that the legitimacy was only widespread, in so far as it pertained to the urban

areas. The said officer was of the view that the Court did not enjoy the same legitimacy in the remote and rural areas of the country. The remaining officer felt that the Court only enjoyed a certain limited measure of legitimacy.

#### Trade Unions

- (a) The trade unions admitted to not having used the Industrial Court very well until recently. Most of the trade unionists stated that they started to use the Court a lot in the year 2000. All of the trade unionists stated that they are now committed to sensitizing workers on the usage of the Court as it is the only 'genuine' forum for trade disputes.
- (b) Trade unionists state that the usage of the Court by employers has declined since employers realized that the IC was a court of fairness and equity
- (c) All the trade unionists felt that the Industrial Court was a credible institution. They also felt that the Court was beginning to gain credibility in the sight of employers' as they were now beginning to sensitize their enterprises on fair employment practices.

### **6. Impact of the Industrial Court**

#### Question six

How do you think the Industrial Court decisions have affected management practices with specific regard to;

6.1 Awareness of fair labour practices

6.2 Implementation of Industrial Court decisions regarding fair labour practices

### 6.3 Managerial prerogative

### 6.4 Management practices in general

#### Academics

- (a) Awareness- The academics were divided on the issue of awareness of fair labour practices. Sixty six per cent felt that the IC had greatly influenced and enhanced awareness of fair labour practices, whilst the remaining academic felt that there was room for improvement.
- (b) Implementation- The academics expressed the same view as in 6(a) above.
- (c) Managerial Prerogative- Whilst all the academics felt that the 'managerial prerogative' of employers had been limited somewhat, they also expressed the view that employers were still free to enjoy a substantial amount of managerial prerogative.
- (d) Management practices- All the academics were of the view that the IC has affected management practices positively.

#### Labour Lawyers

- (a) Awareness- Most of the labour lawyers felt that the Industrial Court decisions have 'revolutionized the industrial relations climate'. One of the lawyers, however felt that there was insufficient awareness amongst the smaller businesses.
- (b) Implementation- The lawyers expressed the general view that most people comply with the decisions of the Court. They stated that the parties (employers in particular) seemed to respect the opinion of the Court,

whereas they do not show any regard for labour officers and their attempts at conciliation and mediation. One lawyer again expressed the view that implementation of IC decisions is more common in larger organizations as they tend to be more aware of procedures to be followed.

- (c) Managerial Prerogative- All the labour lawyers were of the view that employers feel that their managerial prerogative is being eroded.
- (d) Management Practices- All labour lawyers stated that the Industrial Court decisions have had some positive impact on management practices.

#### Management Personnel

- (a) Awareness- All of the management officers expressed the view that only the individuals and companies that subscribed to the Industrial Court judgments were aware of fair labour practices.
- (b) Implementation- All the management officers expressed the same view as in (a) above.
- (c) Managerial Prerogative- All the management officers expressed the view that whilst the Industrial Court decisions had 'curtailed' managerial prerogative, it had also contributed to the formulation of and implementation of 'fair management practices'.
- (d) Management Practices- All of the management personnel felt that the Industrial Court has had a positive effect on management practices in general.

### Trade Unionists

- (a) Awareness- All the trade unionists felt that the IC decisions had brought about a measure of awareness of fair labour practices.
- (b) Implementation- All trade unionist stated that employers, in particular were beginning to appreciate the need to implement the decisions of the Court
- (c) All trade unionists stated that until the establishment of the Industrial Court, employers had enjoyed absolute managerial prerogative as it existed under the old "master/servant" relationship. They also expressed the view that the Industrial Court decisions are viewed by employers as an encroachment of their managerial prerogative.
- (d) All the trade unionists felt that the Industrial Court decisions have had a positive impact on management practices.

### **7. Attitudes of the Court**

#### Question 7

- 7.1 Comment on the Employers attitudes to the Industrial Court
- 7.2 Have you observed any real perceived changes in management practices or policies since the establishment of the Court?
- 7.3 Comment on the Union attitudes to the Industrial Court
- 7.4 Have you observed any changes in union attitudes since the establishment of the Court?

### Academics

- (a) & (b)- Employer attitudes- The academics felt that the employer were initially hostile to the Industrial Court and its decisions. There have, however been changes with indications that employers are becoming more accepting of the Court and its decisions.
- (b) & (d) Union attitudes- All of the academics agreed that in general the Unions are satisfied with the establishment of the Industrial Court and view the Court as an institution 'which fights for worker rights'. One academic expressed the view that the Unions feel the Court is still conservative and as such would like to see the Court adopt a more 'radical' approach.

### Labour lawyers

- (a) & (b)- Employer attitudes- The labour lawyers felt that most employers are aware of employment requirements but still feel uncomfortable with the loss of managerial prerogative. One lawyer in particular, expressed the view that employers now seek opinions before implementing employment policies. He stated further that, most of the conditions of service currently utilized in companies, reflect almost all of the principles enunciated in the Industrial Court judgments.
- (b) & (d) Union attitudes- All of the labour lawyers felt that the Unions were satisfied with the decisions and awards of the Court. One labour lawyer, however observed that Unions still tend to breach recognition agreements particularly with regard to industrial action.

### Management Personnel

- (a) & (b) Employer attitudes- All of the management officers felt that employers were aware of the correct procedures to be followed but were still loathe to follow the said procedures. One of the officers maintained that employers felt that the Court was largely biased towards employees.
- (b) & (d) All of the management officers expressed the view that the Unions were satisfied with the establishment of the Court and the pronouncements of the Court.

### Trade Unionists

- (a) & (b)- Employer attitudes- Trade unionists stated that the Industrial Court decisions have brought about a complete change in employer attitudes and management practices. According to the trade unionists, company policies are now being amended on the basis of IC judgments.
- (b) & (d)- Union attitudes- The trade unionists agreed that they had been slow to approach and fully utilize the Industrial Court. They have since wholeheartedly expressed appreciation of the institution and have pledged to make full use of the Court in future.

## **8. Positive & Negative Aspects/Features of the Industrial Court**

### Question eight

- 8.1 What are the positive aspects of the Industrial Court?
- 8.2 What are the negative aspects of the Industrial Court?

The responses given by the different categories of interviewees were very similar. Consequently the answers have been combined as follows;

(a) Positive Aspects

- the Industrial Court offers employees easier and cheap access to law and remedies;
- the Industrial Court deals with cases expeditiously;
- the Industrial Court offers fairness and justice;
- the Industrial Court is extremely user-friendly;
- the Industrial Court has 'revolutionized the industrial relations landscape';
- the Industrial Court has contributed to the settlement of disputes before they come to Court;

9 Negative Aspects

- the Industrial Courts restricted cost jurisdiction;
- the Industrial Courts equity jurisdiction must be implicitly stated;
- the narrow jurisdiction of the Industrial Court in general;
- the insufficient powers of the Industrial Court;



- the relative informality of the Industrial Court means that many legal practitioners do not accord the Court the status and respect that they should;
- the Industrial Courts effectiveness is 'hampered by badly drafted/ amended and outdated legislation';
- the Industrial Courts apparent 'lack of consistency' as between judges on similar issues;
- Individuals appointed as Judges of the Industrial Court should have specialized labour law knowledge and expertise;
- the Industrial Courts lack of financial resources;
- the Industrial Courts lack of manpower resources, specifically with regard to the professional staff ( Judges and Registrar(s) );
- the Registrars' office should be strengthened to facilitate the resolution of disputes through conciliation and mediation;
- the Industrial Court needs to be more proactive in nature and sensitize the public on the role of the Court through conducting workshops and seminars;
- the bureaucratic restrictions placed on the Industrial Court as a result of being improperly placed under the Ministry of Labour & Home Affairs;

## 9. Conclusion

The interviewees appear to share identical opinions on many of the issues. Some of the issues raised are currently being addressed by way of proposed legislative intervention whilst other issues still remain problematic

## **Chapter Eight: Conclusion- An Assessment of the Industrial Courts Contribution to Labour Relations**

### **1 Introduction**

During the time of the establishment of the South African Industrial Court, P.A.K Le Roux remarked that “*the potential power of the Court, through its development of the concept of the unfair labour practice, to change and affect the whole system of industrial relations in South Africa....is quite clear*”.<sup>1</sup> There can be no doubt that the Industrial Court played a major role in transforming industrial relations in South Africa. In a similar vein, the Industrial Court in Botswana is having a substantial impact on labour relations in Botswana.

### **2. Final Conclusion**

The Industrial Court of Botswana has, without doubt, played a pivotal role in the area of labour relations in Botswana. The Court has provided a forum in which employees are able to exercise their rights and has developed extensive guidelines and principles for fair employment practices. It is also evident that the decisions of the Industrial Court have made it compulsory for employers to rethink their previous employment practices. Managerial prerogative has been severely curtailed and employers are being called upon to ensure that their employment practices are fair, known to the employees and consistently adhered to.

The Industrial Court appears to be accomplishing what the legislation has failed to do, namely bring about progressive and positive change in the labour relations field. Although the existing labour legislation provided a ‘framework’ within

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<sup>1</sup> Le Roux P.A.K., *Developing a System of Industrial Relations Law for South Africa: The Role of the Industrial Courts*, South African Journal of Labour Relations, Vol. 4, No. 3& 4 (1980) :28

which employment rights could be attained or accessed, much of the actual change that has occurred appears to have been instigated by the Court. The Court has also brought a certain element of clarity in the face of badly drafted and complicated legislation. It has significantly simplified complicated procedures relating to strike action and severance pay, to name but a few. Many companies have since taken the IC judgments and incorporated them holistically into their employment policies.

The decisions of the Court have not only wrought a substantial and positive change in the area of employment practices, but have also affected the collective bargaining process. Through its decisions, the Court has clearly supported the collective bargaining process by favouring continued negotiation where necessary. In addition, the Court has not intervened in any collective bargaining process unless asked by one of the parties to promote or facilitate a voluntary settlement or unless a dispute arising from a collective bargaining process is referred to the Court by one of the parties. The general approach of the Court has been to promote the Court as a forum of 'last resort'. This certainly conforms to the best practice benchmark that seeks negotiated compromise over enforced remedies. The Court has also supported the conciliatory and mediatory functions at the level of the Department of Labour thereby emphasizing its commitment towards seeking consensus-based solutions over imposed solutions.

The Court has, by virtue of its existence, tended to promote voluntary settlement of disputes. The mere 'threat' of court action seems to have the effect of catapulting parties into the arena of voluntary settlement. In addition, the Court has attempted, whenever possible, to promote settlement of disputes through holding pre-hearing conferences. This approach helps the Court to identify and narrow the issues at hand and consequently appears to be an important factor in helping the Court to manage its case load effectively. The Court is to be

commended for giving consideration to 'integrating conciliation and adjudication'.

Individual dismissals account for the majority of cases before the Industrial Court. Most individuals are self-represented, with union officials generally failing to appear in Court to represent their members. Unions have, until recently, referred only three strike action disputes to the Court. Previous observations made by the ILO technical assistance teams noted that the Botswana unions were not using the existing systems and institutional frameworks to their best advantage. Another significant consequence of the Industrial Court decisions, is that Unions are now beginning to rely on the principles and guidelines enunciated in the IC judgments to better organize themselves. Unions are expressing a newfound desire to use the Court and its judgments to their benefit.

## 2.1 Implications for the future

Recent studies show an increasing global trend towards ADR. Prospects of establishing successful ADR techniques in Botswana in the near future appear to be slim. This is largely because of;

- the scarcity of private/independent mediation and arbitration services in Botswana;
- the fact that the Botswana government is the largest employer in the country. It is unlikely that the government will submit its labour disputes to such private mediation service; and
- The fact that individual dismissals account for over 90% of the disputes brought before the Court. Most of these individuals are not in a position to pay for private dispute resolution services.

Consequently efficient dispute resolution seems to be largely in the hands of the Industrial Court (for the time being).

### 3. Possible Areas of Further Research

- A study could be undertaken on the future prospects of the Botswana Industrial Court in strengthening labour relations in Botswana;
- Research could be conducted to examine the possibility of extending the Courts dispute prevention functions;
- A comprehensive comparative analysis of Industrial/Labour Court practices and procedures in the SADC region could be conducted to properly assess and evaluate the impact of the Botswana industrial Court within a regional framework.

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## **APPENDIX A                      LIST OF INTERVIEWEES**

1. Botsalano, E.M., National Amalgamated Local & Central Government & Parastatal Manual Workers Union (NALGPWU), Gaborone, Botswana
2. Carr-Hartley, John, Attorney, Armstrongs Attorneys, Gaborone, Botswana
3. Dambe, C., Manager, Trade World
4. Dingake, O.B.K, Lecturer-in-law, University of Botswana, Gaborone, Botswana
5. Frimpong, K., Professor of law, University of Botswana, Gaborone, Botswana
6. Hardisty, S., Attorney/ Labour Relations Consultant, Gaborone, Botswana
7. Mosweu, S., Lecturer-in-law, University of Botswana, Gaborone, Botswana
8. Motshwarakgole, J., Secretary-General, National Amalgamated Local & Central Government & Parastatal Manual Workers Union, Gaborone, Botswana
9. Pheko, T.E.K, Manager, Botswana Housing Corporation, Gaborone, Botswana

10. Phokontsi, M.H., National Amalgamated Local & Central Government & Parastatal Manual Workers Union, Gaborone, Botswana
11. Thebenala, T., Manager, Botswana Copper Ltd. (BCL), Selebi Phikwe
12. Vergeer, V., Attorney, Collins, Newman & Co., Gaborone, Botswana

## **APPENDIX B- QUESTIONNAIRE/INTERVIEW**

### **Industrial Court Procedures**

1) The ILO has stated that an effective dispute resolution system must be efficient and speedy. Please comment on the Botswana Industrial Court procedures having specific regard to the following;

- Complexity; ie; Are the rules and procedures user friendly? Are the rules practical and informal whilst allowing each party to state its case and explain fully its position in the dispute?
- Timeliness
- Technical arguments- The Industrial Court is empowered to sit with assessors to deal with issues of fact and not law. Many of the arguments before the Court are legal arguments. What is your view on technical legal arguments that result in long delays?
- Costs

### **Jurisdiction**

2) Please comment on the Industrial Court's jurisdiction with specific regard to the following;

- Exclusive jurisdiction- What is your viewpoint on the dual jurisdiction exercised by the ordinary Courts and the Industrial Court which has exclusive jurisdiction in trade disputes?

- Disputes of right/Disputes of interest- The Trade Disputes Act is silent on the question of whether the Court should deal with disputes of interest. Should the Court be empowered to deal with disputes of interest?
- Awards/Compensation

3) Please comment on the status of the Industrial Court vis-a vis that of the High Court.

### **Collective bargaining**

4) (a) How would you describe the Industrial Courts role in the collective bargaining process? Would you say it was interventionist in nature or not?

(b) Does the existence of the Industrial Court have any effect on the collective bargaining process at all, ie; Does it facilitate/promote voluntary settlement?

### **Usage of the Court**

5) Please give your viewpoint regarding the usage of the Court by;

- Unions
- Union Strategies; Exploitative or minimal usage of the Court by Unions
- Employers
- Employer Strategies; Exploitative or minimal usage of the Court by Employers

- Do you think the Court enjoys widespread legitimacy?

### **Impact of the Industrial Court**

6) How do you think the Industrial Court decisions have affected management practices with specific regard to the following;

- Awareness of fair labour practices
- Implementation of labour Court decisions regarding fair labour practices
- Managerial prerogative
- Positive or negative impact on management practices?

7) Comment on the Employers attitudes to the Industrial Court?

- Any perceived changes in management practices/policies since the establishment of the Industrial Court?
- Comment on the Unions attitudes since the establishment of the Court
- Any perceived change in union attitudes since the establishment of the Industrial Court?

### **Positive/Negative aspects of the Industrial Court**

8) What are the positive aspects of the Industrial Court?

9) What are the negative aspects of the Industrial Court?

**APPENDIX C – INDUSTRIAL COURT RULES**

***RULES FOR THE CONDUCT OF***

***PROCEEDINGS IN THE***

***INDUSTRIAL COURT OF BOTSWANA***



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  7. Interlocutory applications and procedures not specifically provided for in other rules
  8. Withdrawals and postponements
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  10. Production of documents
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  18. Industrial Court as court of record
  19. Securing the attendance of a witness and witness fees
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## RULES OF THE INDUSTRIAL COURT

(Made under the discretionary powers granted to  
the Court in terms of Section 18(6) of the Trade Disputes Act)

### PREAMBLE

As the Trade Disputes Act, Chapter 48:02, as amended, gives this Court all the powers and rights set out in the Act or any other written law, for the purpose of settling trade disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana (Section 17 (1)) and as this Court is not bound by the rules of evidence and procedure in civil and criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice (Section 19 (1)), these Rules are therefore made to assist the Court in achieving the aforesaid objectives of the Act and when interpreting these Rules, the Court will have regard to substance rather than form (Rule 12 (4)) in order to dispense substantial justice between the parties.

### 1. APPLICATION AND INTERPRETATION

- (1) These Rules may be cited as the Rules of the Industrial Court and shall apply to proceedings in the Industrial Court.
- (2) These Rules shall not have the force of law and shall serve merely as guidelines for the conduct of proceedings in the Industrial Court.
- (3) Non-compliance with any of these Rules shall not render any proceedings void unless the Court, in its discretion, so directs in terms of Section 18(6) of the Act.
- (4) In these Rules unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Trade Disputes Act, Chapter 48:02, as amended, shall bear such meaning and any reference to a section shall be a reference to that section in the said Act and

**"Act":** means the Trade Disputes Act, Chapter 48:02, as amended, and includes any regulation made thereunder;

**"court":** means the Industrial Court contemplated in Section 17 (1) of the Act and includes any Judge and any Judge sitting with any nominated member, authorised to perform the functions of the Industrial Court;

- "day": means a court day, which in turn means any day other than a Saturday, Sunday or public holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these Rules or fixed by any order of court;
- "deliver": means to serve a copy of any process on each party and to file the original process with the Registrar;
- "notice": means a written notice and "notify" means to notify in writing;
- "party": means a party to a trade dispute and also includes the representative of a party;
- "process": means any document or form required to be served or filed in terms of these Rules or the Act;
- "public holiday": means a day declared by law to be a public holiday under the Public Holidays Act, Chapter 03:07;
- "serve.": means to serve in accordance with Rule 6 and "service" has a corresponding meaning.

## 2. OFFICE HOURS AND ADDRESS OF THE REGISTRAR

- (1) The office of the Registrar shall be open to the public for the filing of process from 08:00 to 12:30 and from 14:00 to 16:00 on every other day than a Saturday or Sunday or public holiday: provided that the Registrar may in his discretion or shall when so directed by the Court, issue such process and accept documents for filing before or after the said official hours.
- (2) The address and other relevant numbers of the Registrar are as follows:
  - (a) Physical address:  
 Broadhurst Business Centre  
 Units 4 and 5  
 Plot Numbers 10210/11  
 Corner Bodungwe Road and Nelson Mandela Drive  
 Broadhurst Industrial Estate  
 Gaborone
  - (b) Postal Address:  
 Private Bag BR 267  
 Gaborone

(c) Telephone Number (267) 300565

(d) Telefax Number (267) 300567

3. DUTIES AND FUNCTIONS OF THE REGISTRAR

- (1) The Registrar is a person appointed in terms of Section 17(8) of the Act and who is responsible for the administrative functions of the Court.
- (2) The Registrar shall perform all the duties and functions set out in the relevant job description under the supervision of a Judge, who is in charge of that office.
- (3) The Registrar, in conjunction with the Judge President of the Industrial Court, shall decide for which matters fees are payable, and for such matters the fees, set out in the Second Schedule to the Rules of the High Court, shall be paid in respect of the matters to which they relate.

4. FORM AND CONTENT OF PROCESS

- (1) Any trade dispute, as contemplated in Section 5 (1)(a) of the Act, which need not necessarily be referred to and which has not been referred to the Commissioner of Labour, may as soon as possible be referred by any party to the dispute directly to the Industrial Court for a hearing and determination.
- (2) Any trade dispute, as contemplated in Section 5(1)(a) of the Act, which has nevertheless been referred to the Commissioner of Labour and any trade dispute, as contemplated in Section 5(6) of the Act, which has to be referred to the Commissioner of Labour, may as soon as possible after the Commissioner of Labour has issued a certificate in terms of Section 7 of the Act, be referred to the Industrial Court for a hearing and determination by any party to the dispute.
- (3) A letter of referral, (Form IC.1) and where applicable, accompanied by the said certificate, shall be deemed to be a proper referral of such dispute to the Industrial Court.
- (4) Such party (the Applicant) may simultaneously with the delivery of such letter of referral or shall with 14 days thereafter, file with the Registrar, a statement of case, as near as may be in accordance with Appendix 1 to these Rules, and serve a copy thereof on the Respondent, which statement of case shall:
  - (a) be signed by the party by whom it is delivered;

- (b) contain in full the title of the matter, the names of the parties and where possible, the number assigned by the Registrar to the matter at the head of such statement;
  - (c) contain clear and concise particulars relevant to the unresolved trade dispute and any further material facts on which the applicant relies for the relief sought;
  - (d) be divided in paragraphs including subparagraphs, in respect of content, which paragraphs shall be consecutively numbered and which shall, as near as possible, each contain a distinct averment;
  - (e) set out clearly the nature of the relief sought;
  - (f) contain an address at which the Applicant will accept service of process in the proceedings;
  - (g) contain a notice that if the other party (the Respondent):
    - (i) intends opposing such application, he is required within 14 days after delivery of the said statement of case, to deliver a reply referred to in subrule (5);
    - (ii) fails to deliver such reply, a determination, including an order as to costs, may be made in his absence;
  - (h) contain a list of books and documents relevant to the application, which are in the applicant's possession or under his control.
- (5) A Respondent intending to oppose the application shall within the said 14 day period file with the Registrar, a statement of defence, as near as may be in accordance with Appendix 2 to these Rules and serve a copy thereof on the Applicant, which statement of defence shall:
- (a) set out clearly and concisely the grounds of opposition and the material facts relied upon in support of such grounds;
  - (b) comply with all the requirements set out in subrules (4) (a), (b), (d), and (f);
  - (c) contain a list of books and documents relevant to his opposition and any relief he may seek which are in the Respondent's possession or under his control.
- (6) A Respondent intending to counterclaim shall simultaneously with his statement of defence deliver a statement which shall:

- (a) contain clear and concise particulars relevant to his counterclaim and any further material facts on which he relies for the relief sought,
  - (b) comply with all the requirements set out in subrules (4) (a), (b), (d), (e), (f) and (g), which will allow the Applicant 14 days within which to reply to the Respondent's counterclaim statement.
- (7) The parties may not without the leave of the Court deliver any further statements and if no such leave is sought, the pleadings will be deemed to be closed 7 days after the filing of the last of the aforesaid statements.
  - (8) The facts set out in the Applicant's statement of case and in the Respondent's statement of defence and in his counterclaim statement need not be verified in an accompanying affidavit (sworn statement).
  - (9) Any late delivery of a statement of case or statement of defence may be condoned by the Court on good cause shown in terms of Rule 12 (1) (a).
  - (10) Should the court direct that the documents in the Court file be indexed and paginated, then the provisions of Rule 7 (2) shall apply.

## 5. FILING OF PROCESS FOR A HEARING

- (1) The filing of process with the Registrar shall take place by hand, by registered post, by telefax or other electronically printed manner.
- (2) If any process is transmitted by telefax or other electronically printed manner, then the original process shall, for record purposes, be handed in to the Registrar or sent to him by registered post before the matter is set down for a hearing.
- (3) A document shall be deemed to have been filed with the Registrar on the date:
  - (a) on which such document was handed in to the Registrar;
  - (b) on which such document sent by registered post was received by the Registrar;
  - (c) indicated on the telegram received by the Registrar;
  - (d) of the completion of the whole of the transmission of the telefax or other electronically printed transmission.

## 6. SERVICE OF PROCESS

- (1) Subject to subrule (2) any process which is required to be served in terms of these rules shall be served by the party who desires service thereof or served on behalf of such party by any private person or by a person authorised to serve process of the High Court or the Magistrates' Court:
  - (a) by handing a copy thereof to the person concerned personally;
  - (b) by leaving at the place of residence or business of the person concerned a copy thereof with the person apparently in charge of the premises at the time of delivery being a person who is apparently not less than 16 years of age: provided that where a building other than a hotel, boarding house, hostel or similar place of residence is occupied by more than one person or family, "place of residence" for the purpose of this paragraph means that portion of the building occupied by the person on whom service is to be effected;
  - (c) by leaving at the place of employment of the person concerned a copy thereof with any person who is apparently not less than 16 years of age and who is apparently in authority over the person concerned;
  - (d) if the person concerned has chosen a *domicilium citandi* (an address for service of process), by leaving a copy thereof at such address;
  - (e) in the case of a company or other juristic person, by handing a copy thereof to a responsible employee of such a company or other juristic person at its registered office or its principal place of business within Botswana, or its main place of business within the district in which the dispute first arose, or, if there is authorised by its constitution to defeno such employee willing to accept service, by affixing a copy to the main door of such office or place of business;
  - (f) by handing a copy thereof to any representative authorised in writing to accept service on behalf of the party concerned;

- (g) in the case of a partnership, firm or voluntary association, by leaving a copy thereof with a person who at the time of service is apparently in charge of the premises and apparently not less than 16 years of age, at the place of business of such partnership, firm or voluntary association or if such partnership, firm or voluntary association has no place of business, by serving a copy thereof on a partner in the partnership, the owner of the firm or the chairman or secretary of the managing or other controlling body of such association, as the case may be, in one of the manners set forth in subrules (1)(a), (b), (c), (d), (e), or (i);
  - (h) in the case of a local authority, by handing a copy thereof to the town clerk, associate town clerk, assistant town clerk or any person acting on behalf of any such officer, and in the case of a statutory body, by handing a copy thereof to the person and proceedings on its behalf, or any other person authorised to act on its behalf, or in any other manner provided by law; or
  - (i) by sending a copy thereof by registered post to the last known postal address of the person concerned and, unless the contrary is proved, it shall be presumed that service was effected on the fourth day following the day upon which the process was posted.
- (2) If the Court is satisfied that service cannot conveniently or expeditiously be effected in any manner contemplated in subrule (1), service shall be effected in the manner directed by the Court, which may include electronic transmission by telegram, telex, telefax or other electronically printed manner.
- (3) Where the party to be served with any document initiating or opposing an interlocutory or other application is represented by a representative, service may be effected on the representative.
- (4) Service shall be proved in a court:
- (a) by a signed acknowledgement or receipt by the person upon whom the document was served;
  - (b) by an affidavit by the person who effected service, if such person is a private person;
  - (c) by the usual return of service form if service was effected by a person authorised to serve process of the High Court or the Magistrates' Court;
  - (d) in the case of service by registered post, by producing the certificate concerned issued by the Post Office for the posting of such registered letter.



- (5) Service shall be deemed to have been effected if the Court is satisfied that any process has come to the notice of the person for whom it was intended, regardless of the manner in which it came to such person's attention.
- (6) If the Court is not satisfied that service has taken place in accordance with this Rule or that the process has come to the attention of the person concerned, it may make such order as to service as it may deem fit.

7. INTERLOCUTORY APPLICATIONS AND PROCEDURES NOT SPECIFICALLY PROVIDED FOR IN OTHER RULES

- (1) (a) An interlocutory application or other application, in respect of which no procedure has been provided for by the Act or by these Rules, shall be brought by a party on notice of motion as near as may be in accordance with Appendix 3 to these Rules and shall be supported by affidavit (sworn statement), save that applications as to procedural aspects need not be supported by affidavit, and, depending on the nature thereof, the Court may dispense with such notice;
- (b) The Respondent may serve an answering affidavit on the Applicant within 10 days of service of the application;
- (c) The Applicant may serve a replying affidavit on the Respondent within 7 days of service of the answering affidavit.
- (2) Any party shall, when requested to do so by the Registrar on the direction of the Court, paginate and index all the process (not correspondence) in the Court file at least 24 hours before the hearing and hand a copy of such index to the other party before the commencement of the hearing.
- (3) Should a situation arise in proceedings or contemplated proceedings, for which the Rules do not provide, the Court may adopt such procedure as it may deem fit in the circumstances.

8. WITHDRAWALS AND POSTPONEMENTS

- (1) Whenever a matter is settled out of court, or when parties agree to postpone a matter, the party who requested the matter to be placed on the roll shall forthwith notify the Registrar by delivering a notice of withdrawal or postponement, as the case may be.
- (2) The parties may not, without the leave of the Court, postpone or remove a matter from the roll within 2 weeks of the date of set down, unless such matter has been settled.

9. PRE-HEARING CONFERENCE

- (1) The parties shall, when requested by the Court to do so, hold an informal conference at a mutually convenient time, date and place, prior to the hearing of any matter.
- (2) At such conference, without prejudice to the rights of the parties, consideration may be given to the following matters:
  - (a) any means whereby the dispute may be settled, inclusive of such previous endeavours as have been made by the parties to settle the dispute by agreement or otherwise;
  - (b) any agreement as to the nature and extent of the unresolved issues;
  - (c) such facts as are common cause or are admitted by any party;
  - (d) any steps which may shorten the hearing;
  - (e) discovery or exchange of documents;
  - (f) the manner in which documentary evidence is to be dealt with;
  - (g) whether evidence on affidavit will be admitted with or without cross-examination of the deponent;
  - (h) which party shall begin;
  - (i) the necessity or otherwise for an on-the-spot inspection;
  - (j) securing the presence at court of any witness ; and
  - (k) any other matter or means whereby the proceedings may be shortened.
- (3) Notwithstanding the provisions of subrule (1) any party may on reasonable notice require the other party or parties to attend a conference at a mutually convenient time, date and venue to attempt to agree on such matters referred to in subrule (2) as may be relevant.
- (4) Notwithstanding the provisions of subrules (1) and (3), the parties shall, when directed by the Court to do so, hold a further conference in chambers prior to the hearing of any matter, during which a Judge or a nominated member of the court or the Registrar may preside, in which case such presiding officer may also act as a mediator or conciliator.

- (5) The parties shall draw up and sign minutes recording the matters agreed to at the conferences referred to in subrules (1) and (3) as well as the matters still in dispute and the Applicant shall ensure that a copy thereof is filed with the Registrar at least 3 days prior to the hearing.

#### 10. PRODUCTION OF DOCUMENTS

- (1) A party shall be obliged to produce all documents listed in his process, in court at the hearing of the matter.
- (2) A party shall afford the other party, on request, a reasonable opportunity to inspect and make copies of the documents referred to in subrule (1) before the hearing.
- (3) A party who believes that the other party is in possession of documents which he has not listed may apply to the Court for an appropriate order and the Court may make such order as it deems fit.
- (4) Should a party intend to introduce a document in evidence which has not been discovered in terms of Rule 4(4)(h) the Court may in its discretion decline to admit such document or admit it on such terms as it deems fit, including an adjournment to enable the other party to consider the said document.

#### 11. CONSENT TO DETERMINATIONS AND ORDERS, AND JUDGMENTS BY DEFAULT

- (1)
  - (a) A Respondent may at any time in respect of the whole or any part of an application consent to judgment for the relief claimed.
  - (b) The consent referred to in subrule (1) shall be in writing, signed and dated by the party and shall be witnessed.
  - (c) On receipt of such consent, the Applicant may apply in writing to the Registrar that an order be made by the Court in accordance with such consent and the Court may make such an order.
- (2) Whenever an Applicant fails to file his statement of case or other response to an application by the Respondent timeously the Court may on application, having satisfied itself that notice of set down or other appropriate notification has been given, and that all relevant documents have been served on the Applicant, order that the matter proceed and make such determination or order as it considers just in the absence of the Applicant.

- (3) Whenever a Respondent fails to submit an answering affidavit, his statement of defence or other response to an application, the Court may on application, having satisfied itself that notice of set down or other appropriate notification has been given, and that all relevant documents have been served on the Respondent order that the matter proceed and make such determination or order as it considers just in the absence of the Respondent.
- (4) (a) Whenever any party fails to comply in good time with any time limit or any request in terms of these rules, the other party may notify the defaulting party that he intends to apply, after expiry of a period of 14 days from the date of dispatch by registered post or telefax or delivery by hand of such notice, for an order requiring compliance within the time indicated in such notice and may include a notice of intention to bar.
- (b) Upon the failure of the party upon whom a notice referred to in subrule (4) (a) has been served to comply therewith, the party giving such notice may make application to the Court for an order for such relief as is specified in such notice, including an order of bar, and the Court may make such order as it may deem fit.
- (5) The Court may grant an order by default without hearing evidence or may require viva voce (oral) evidence or evidence by way of affidavit before granting an order by default.

## 12. GENERAL POWERS OF THE COURT

- (1) Without prejudice to the general discretion granted to the Court by Section 18 (1) (d) of the Act, the Court may on application or of its own motion at any time:
  - (a) before or after the expiry of any period condone any failure to comply with any rule including time periods save for the time within which an appeal may be noted to the Court of Appeal and may abridge any time prescribed by these Rules;
  - (b) allow the allegations in any form to be amended at any time;
  - (c) if in any proceedings it appears that any party to the proceedings has been incorrectly or defectively cited, correct the error or defect, or order the substitution of a party;
  - (d) join any other person at any time on such terms and conditions as it deems fit;

- (e) make an order consolidating the disputes pending before it in separate proceedings where it deems such consolidation to be expedient and just;
- (f) allow any party at any time to amend his application or his opposition;
- (g) grant any order in the absence of any party if it is satisfied that, that party has had notice of the date of set down and that all relevant documents have been served on such party;
- (h) rescind on good cause shown, any order made by it in the absence of a party;
- (i) order any person who fails to comply with any notice or directive given in terms of these Rules to do so and/or order that any party in default shall not be entitled to any relief in such proceedings;
- (j) set aside any irregular step which has been taken by another party unless the party complaining of the irregular step has with knowledge of the irregularity taken any further step in the proceedings;
- (k) declare, in the case of a partnership or firm, that any person was at a certain time or for a certain period a partner of a partnership or the proprietor of a firm;
- (l) grant on application:
  - (i) urgent relief;
  - (ii) urgent interim relief pending a decision by the court after a hearing;
  - (iii) an interdict or any other order in the case of any action that is prohibited by law regarding any trade dispute; provided that in the case of urgent relief sought the provisions of subrules 7 (1) (b) and (c) and 7 (2) shall not apply;
- (m) before or during a hearing, grant a rule nisi (an order requiring the other party to show cause why a certain order should not be made) and confirm or discharge a rule nisi on a return date if appropriate unless the Act otherwise provides;
- (n) preside at any pre-hearing conference.

- (2) In any application referred to in subrule (1) the Court may make such order as it deems fit, including an appropriate order as to costs if such costs are permissible in terms of Section 27 of the Act.
- (3) It will be in the discretion of the Judge to decide when and for how long the court will be in recess during any year.
- (4) The Court in the exercise of its powers and discretion and in the performance of its functions, or in any matter incidental thereto, may act in such manner as it may consider expedient in the circumstances in order to achieve the objectives of the Act, and in so doing it shall have regard to substance rather than form, save as is otherwise provided in the Act.

### 13. EVIDENCE

- (1) Without prejudice to the general powers granted to the Court by Section 19 of the Act regarding the hearing of evidence, the following rules of evidence shall also apply:
  - (a) A party intending to call an expert witness shall give reasonable notice thereof to the Registrar and the other party to the dispute together with a summary of the proposed evidence of such witness at a time prior to the hearing which is sufficient to enable each party to consider the summary and to prepare its case.
  - (b) Should a party fail to comply with subrule (1) (a) the Court may in its discretion decline to admit such expert evidence or admit it on such terms as it deems fit, including an adjournment to enable the other party to consider such expert evidence.
  - (c) The Court may permit the parties together with or in lieu (instead of) of other evidence:
    - (i) to adduce evidence by way of affidavit; or
    - (ii) to argue a matter on a stated case; or
    - (iii) to argue a matter on the record of some other proceedings.
- (2) The Court shall decide in its discretion which party shall commence a matter or commence leading evidence.

### 14. LANGUAGE TO BE EMPLOYED IN COURT

- (1) The language to be employed in the court shall be English and the evidence, all process and all the records of proceedings in the court shall be in that language.

- (2) If any of the parties or witnesses in proceedings before the court do not understand the English language, then the proceedings shall be interpreted from English into the language understood by the parties or the witnesses concerned as the case may be, and vice versa (the other way round).

## 15. OATH OF OFFICE

- (1) Before any interpreter may interpret in court he shall take an oath or make an affirmation in the following form:

"I, .....  
(full names)

do hereby swear/solemnly and sincerely affirm and declare that whenever I may be called upon to perform the functions of an interpreter in any proceedings in the court I shall truly and correctly and to the best of my ability interpret from the language I am called upon to interpret from into the English language and vice versa".

- (2) A nominated member of the court shall not perform any function of the court unless he has taken an oath or made an affirmation in the following form:

"I, .....  
(full names)

do hereby swear/solemnly and sincerely affirm and declare that I will in my capacity as nominated member of the Industrial Court, administer justice to all persons alike without fear, favour or prejudice".

- (3) Any such oath or affirmation shall be taken or made before the Judge of the court, who has been designated the President of the court and shall be signed by the person taking such oath.

## 16. HEADS OF ARGUMENT

The Court may at any time before, during or after a hearing and in any matter call upon the parties to deliver a concise statement of the main points which the parties respectively intend to argue, as well as a list of authorities intended to be referred to, and shall specify the date by which those documents shall be delivered and the number of copies required.

## 17. COSTS

- (1) The costs awarded in terms of a determination, order or award of the Court shall be taxed by the Registrar in accordance with the provisions of Section 27 of the Act.

- (2) (a) Costs taxed by the Registrar shall be subject to review by a Judge of the court on application by one or more of the parties on notice to all other parties within 14 days of such taxation.
- (b) Such application shall identify each disputed item or part of an item together with the grounds of objection to the allowance or disallowance thereof.
- (c) Any other party may within 10 days of receipt of the application submit written contentions, including ones not advanced at the taxation, on each item sought to be reviewed and thereafter the Registrar shall frame his report and supply a copy to each party who may within 7 days of receipt thereof submit further submissions.
- (d) The Registrar shall thereafter submit the above documents to a Judge of the court who may decide the matter on the documents alone or together with such information he may require from the Registrar or if he deems fit, after hearing the parties in chambers.
- (e) The Judge may make such order as to costs of the case as he deems fit, if such costs are permissible in terms of Section 27 of the Act.
- (3) Qualifying fees for expert witnesses shall not be recoverable as costs between party and party, unless so directed by the Court.

## 18. INDUSTRIAL COURT AS COURT OF RECORD

- (1) A record shall be kept of:
  - (a) any judgment or ruling given by the Court;
  - (b) any evidence given in court;
  - (c) any objection made to any evidence received or tendered;
  - (d) any on-the-spot inspection and any matter recorded as a result thereof; and
  - (e) the proceedings of the Court generally, save that the Court may direct that argument need not be recorded.
- (2) Such record shall be kept by such means, including hand-written notes, shorthand notes or electronic recording, as the Court may deem expedient.



- (3) (a) After the person who made the hand-written notes, shorthand notes or electronic recordings has certified it as correct it shall be filed with the Registrar.
- (b) A transcript of the notes or the record or a portion thereof may be made on request of the Court or any of the parties upon payment of such fee as may be prescribed from time to time.
- (c) After the person who made the transcription has certified it as correct the transcript, together with the hand-written notes, shorthand notes or electronic record shall be returned to the Registrar.
- (d) The transcript of the hand-written notes, shorthand notes or electronic record certified as correct as envisaged in paragraph (c) shall be deemed to be correct until the contrary is proved.

#### 19. SECURING THE ATTENDANCE OF A WITNESS AND WITNESS FEES

- (1) A witness who attends court by order of the court in terms of sub-section 19 (2) (b) of the Act shall be paid an allowance towards travel and subsistence as are provided for in Rule 76 of the Rules of the High Court.
- (2) A party who requires a witness to attend court, shall be liable for the payment of any travelling and/or subsistence costs so incurred by such witness.
- (3) Any party who anticipates any problem or possible problem in securing the attendance at court of a witness, may request the Court to authorise the issue of a subpoena for such witness to appear at court on a date and at a time and place specified in the subpoena: provided that such party must satisfy the Court that, in his opinion, such witness may be able to give material information concerning the alleged dispute, or who he suspects or believes has in his possession or custody or under his control any book, document or thing which has any bearing on the alleged dispute: provided further that such party must also satisfy the Court as to the grounds for anticipating any problem or possible problem in securing the attendance at court of such witness: provided further that the provisions of subrule (2) shall apply in respect of the travelling and/or subsistence costs of such witness.

20. **APPEALS**

- (1) An appeal in terms of Section 18 (4) of the Act shall be noted and prosecuted in terms of Part III of the Court of Appeal Rules.
- (2) A copy of the notice of appeal shall be filed with the Registrar of the Industrial Court.
- (3) The fees set out in Parts A and C of the First Schedule to the Court of Appeal Rules shall be paid in respect of the matters to which they relate.

APPENDIX 1IN THE INDUSTRIAL COURT OF BOTSWANAAPPLICANT'S STATEMENT OF CASE IN TERMS OF RULE 4 (4)

Case No. IC \_\_\_\_\_ / \_\_\_\_\_

In the dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

TO: The Registrar  
 Industrial Court  
 Private Bag BR 267  
 Gaborone

And to: (Insert the Respondent's name and address)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

## 1. Particulars of the Applicant:

(a) Name: (If there are a number of Applicants, attach a list with all their names)

\_\_\_\_\_

(b) Description: (e.g. individual/s, firm, company, partnership, organisation, trade union, etc.)

\_\_\_\_\_

(c) Physical Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(d) Postal Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(e) Telephone No.: \_\_\_\_\_

(f) Telefax No.: \_\_\_\_\_

(g) Address for service of documents in these proceedings:

---



---



---



---

2. Particulars of the Respondent:

(a) Name: 

---

(b) Description: (e.g. individual, firm, company, partnership, organisation, trade union, etc.)

---

(c) Physical Address: 

---

(d) Postal Address: 

---

(e) Telephone No.: 

---

(f) Telefax No.: 

---

3. Employment particulars of the Applicant:

(a) Date of commencement of employment with the Respondent: 

---

(b) Nature of the Respondent's business: 

---

(c) Nature of the Applicant's employment: 

---

(d) Remuneration of the Applicant when so employed: 

---

(e) Date of termination of contract of employment or date on which alleged trade dispute arose: 

---

4. Brief description of alleged trade dispute: (e.g. dismissal, suspension, withholding wages etc.)

---



---



---

5. Particulars of alleged trade dispute: (set out clear and concise particulars in paragraphs, including sub-paragraphs, consecutively numbered on a separate sheet of paper)
6. Particulars of relief sought: \_\_\_\_\_  
\_\_\_\_\_
7. Dates and venues of all attempts to settle the alleged trade dispute:
  - (a) Before the District Labour Officer:  
\_\_\_\_\_  
\_\_\_\_\_
  - (b) Before the Commissioner of Labour:  
\_\_\_\_\_  
\_\_\_\_\_
  - (c) Privately between the parties:  
\_\_\_\_\_  
\_\_\_\_\_
8. List of books or documents relevant to this matter, which are in the Applicant's possession or under his control (use a separate sheet of paper)
9. Notice to the Respondent:
  - (a) If the Respondent intends opposing this application, he is required within 14 days after service on him of the Applicant's statement of case to deliver, in terms of Rule 4 (4), his statement of defence, as near as may be in accordance with Appendix 2 to the Rules.
  - (b) If the Respondent fails to deliver such statement of defence, a determination, including an order as to costs, may be made in his absence.

Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

\_\_\_\_\_  
APPLICANT OR APPLICANT'S REPRESENTATIVE

APPENDIX 2

IN THE INDUSTRIAL COURT OF BOTSWANA

RESPONDENT'S STATEMENT OF DEFENCE IN TERMS

OF RULE 4 (5)

Case No. IC \_\_\_\_\_/\_\_\_\_\_

In the dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

TO: The Registrar  
Industrial Court  
Private Bag BR 267  
Gaborone

And to: (Insert the Applicant's name and address)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

1. Particulars of the Respondent:

(a) Name: \_\_\_\_\_

(b) Description: (e.g. individual, firm, company, partnership, organisation, trade union, etc.)  
\_\_\_\_\_

(c) Trade name (if any): \_\_\_\_\_

(d) Physical Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(e) Postal Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (f) Telephone No: \_\_\_\_\_
- (g) Telefax No: \_\_\_\_\_
- (h) Address for service of documents in these proceedings:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

2. Objection to jurisdiction of this Court: (Complete only if applicable - set out fully the grounds for such objection - if necessary use a separate sheet of paper)  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
3. The Respondent's opposition to the applicant's statement of case: (set out clear and concise grounds of opposition with a specific admission or denial of the allegations in each paragraph and sub-paragraph on a separate sheet of paper)  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
4. Relief sought: (If the Respondent opposes the relief sought but thinks the Applicant is entitled to some other relief - set out particulars of such other relief)  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
5. List of books and documents relevant to the Respondent's opposition, which are in the Respondent's possession or under his control (use a separate sheet of paper)

Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

\_\_\_\_\_  
 RESPONDENT OR RESPONDENT'S REPRESENTATIVE

**NOTE:**

If the Respondent intends to counterclaim he must deliver simultaneously with his statement of defence a statement as near as may be in accordance with *Appendix 1* to the Rules, with the necessary amendments to the required particulars to suit his specific counterclaim and the heading should be changed to read: Respondent's Counterclaim.

APPENDIX 3

RULE 7 (1) (a)

IN THE INDUSTRIAL COURT OF BOTSWANA

HELD AT \_\_\_\_\_

Case No. IC \_\_\_\_\_ / \_\_\_\_\_

IN THE MATTER BETWEEN:

\_\_\_\_\_ APPLICANT

And

\_\_\_\_\_ RESPONDENT

\_\_\_\_\_

NOTICE OF MOTION

TO: The Registrar  
Industrial Court  
Private Bag BR 267  
Gaborone.

And to: (insert the Respondent's name and address)

\_\_\_\_\_

Kindly take notice that the Applicant intends bringing an application in terms of Rule 7 (1) (a) at a time and date to be fixed by the Registrar for an order in the following terms:

\_\_\_\_\_

\_\_\_\_\_

(Here set out the relief sought, if necessary use a separate sheet of paper)

\_\_\_\_\_

(In the case of an urgent application the Applicant must telephone the Registrar in advance for a suitable date and time and this paragraph should then read as follows:

Kindly take notice that the Applicant intends bringing an urgent application in terms of Section 20 (3) of the Trade Disputes Act at the Industrial Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, or so soon thereafter as the matter can be heard, for an order in the



following terms: (Here set out the urgent relief sought, if necessary use a separate sheet of paper.)

---



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Take notice further that the affidavit of \_\_\_\_\_, together with the annexures thereto (if any), annexed hereto, will be used in support of this application.

Take notice further that the Applicant has chosen the following address at which service of process in these proceedings will be accepted:

---



---



---



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Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_  
APPLICANT OR APPLICANT'S REPRESENTATIVE

**NOTE:**

The facts on which the Applicant relies for the relief sought must be set out clearly and concisely in an accompanying affidavit in paragraphs, including sub-paragraphs, consecutively numbered and any other supporting affidavits and documents must be attached to this founding affidavit. The Respondent in his answering affidavit must either admit or deny each of these facts and must similarly set out facts on which he relies for opposing such application.

## APPENDIX D - INDUSTRIAL COURT DOCUMENTATION

### INDEX OF IC. FORMS

IC. 1	Letter of referral
IC. 2	Commencement of Proceedings
IC. 3	Copy of Index Pleadings
IC. 4	Pre-hearing requirements
IC. 5	Reminder
IC. 6	Respondent in default
IC. 7	Enrolment requirements
IC. 8	Notice of setdown
IC. 9	Change of date of setdown
IC. 10	Request to facilitate service
IC. 11	Telephone Memo
IC. 12	Copy of Court order
IC. 13	Copy of judgment
IC. 14	List of exhibits
IC. 15	Result sheet
IC. 16	Subpoena
IC. 17	Oath of Office (Assessors)
IC. 18	Confirmation of Selection of Assessor
IC. 19	Reminder to File Statement of Case
IC. 20	Reminder to File Proof of Service
IC. 21	Writ of Execution

**THE INDUSTRIAL COURT OF BOTSWANA**

**FORM IC.1**

**LETTER OF REFERRAL  
(RULE 4 (1) AND (2))**

---

I, the undersigned, hereby refer the dispute between the following parties to the Industrial Court in terms of Section 7 of the Trade Disputes Act, Chapter 48:02, as amended, for a hearing and a determination in terms of Section 18 (1) of the said Act:

APPLICANT: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

TEL. NO.: \_\_\_\_\_ FAX NO. \_\_\_\_\_

REFERENCE NO. OR PERSON IN CHARGE:

\_\_\_\_\_

AND

RESPONDENT: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

TEL. NO.: \_\_\_\_\_ FAX NO.: \_\_\_\_\_

REFERENCE NO. OR PERSON IN CHARGE:

\_\_\_\_\_

A copy of the Section 7 certificate, received from the Commissioner of Labour, is annexed hereto.

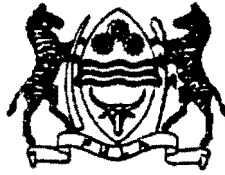
The applicant's statement of case (rule 4(3)) is also annexed hereto/will be filed within the said 14 day period.\*

Dated at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

\_\_\_\_\_  
APPLICANT OR APPLICANT'S REPRESENTATIVE

\* delete whichever is not applicable

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

Form IC. 2

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Commencement of Proceedings

---

Case No. IC. \_\_\_\_/\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_ And to: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/ Madam

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

This office has received a letter of referral from the Applicant in the abovementioned dispute. Case number IC. \_\_\_\_/\_\_\_\_ has been allocated in respect of the said dispute, which case number should be used in all future communications and on all relevant documents.

The Applicant's attention is drawn to the provisions of rule 4 (3) regarding the delivery of a statement of case, if it has not already been done.

The Respondents' attention is drawn to the provisions of rule 4 (3) (g) (i) and rule 4 (4) regarding the delivery of a statement of defence, if it has not already been done.

Yours faithfully

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

FORM IC. 3

COPY OF INDEX OF PLEADINGS

Case No. IC. \_\_\_\_\_ / \_\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/ Madam

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

Herewith a copy of the index of the pleadings in the above matter which has been set down for a hearing at \_\_\_\_\_ on \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_ at 09:30.

Kindly see to it that your documents are marked and paginated accordingly, to obviate unnecessary delays when these documents are referred to in Court.

Yours faithfully

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

**FORM IC. 4**

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**PRE-HEARING REQUIREMENTS**

---

Case No. IC \_\_\_\_ / \_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_ AND TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

The above matter has been enrolled for a hearing in the Industrial Court at the abovementioned venue on \_\_\_\_\_ at \_\_\_\_\_.

Your attention is drawn to the following items set out here below, which are circled. Kindly attend to the circled items immediately.

1. **CONFIRMATION OF ATTENDANCE**

To ensure that this matter is heard on the abovementioned date/s, both parties are requested to contact the Registrar at least one week before the aforesaid trial date to confirm that the matter is being proceeded with.

2. **PAGINATION OF DOCUMENTS**

In terms of rule 4(9) read with rule 7(2) the Court has directed that the Applicant paginate and index all the process (not correspondence) in the court file at least 24 hours before the hearing and hand a copy of such index to the Respondent before the commencement of the hearing.

3. **PRE-HEARING CONFERENCE**

- (a) In terms of rule 9(1) the Court has directed that the parties shall hold an informal pre-hearing conference at a mutually convenient time, date and place prior to the aforesaid trial date to consider the matters set out in rule 9(2) and the parties' attention is drawn to the provisions of rule 9 (5) regarding the filing of pre-hearing minutes.
- (b) In terms of rule 9(4) the Court has directed that the parties attend a pre-hearing conference in the Judge's Chambers at 09:00 on the morning of the aforesaid trial date, during which conference the Judge or a nominated member of the Court or the Registrar will preside.

Yours faithfully,

**REGISTRAR**



PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

**Form IC.5**

---

**Reminder**

---

Case No. 1C \_\_\_\_\_ / \_\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_ And to: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Dear Sir/Madam

**Re: The dispute between**

**Applicant:** \_\_\_\_\_

**Respondent:** \_\_\_\_\_

On \_\_\_\_\_ the Applicant was sent a letter (form 1C.\_\_\_\_\_) regarding \_\_\_\_\_ to which no response has as yet been received.

Should you fail to respond within one month hereof, the file will be closed.

Yours faithfully

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

**FORM IC.6**

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**RESPONDENT IN DEFAULT**

---

Case No. 1C \_\_\_\_\_ / \_\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam

**Re: The dispute between:**

**Applicant:** \_\_\_\_\_

**Respondent:** \_\_\_\_\_

The records in this office show that the Respondent has to date failed to file a statement of defence in reply to your statement of case.

In the circumstances you are requested to advise this office as soon as possible whether the matter has been settled or whether you wish to apply for a default judgment against the Respondent.

Yours faithfully

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

FORM IC.7

---

ENROLMENT REQUIREMENTS

---

Case No. IC \_\_\_\_\_ / \_\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

And to: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam

Re: The Dispute between:

Applicant: \_\_\_\_\_

Respondent \_\_\_\_\_

As both parties have filed documents, the abovementioned matter is now ready for setdown, but before it can be setdown, the Applicant, after having consulted the Respondent, must complete (a) and (b) herebelow and return this form to the Registrar as soon as possible and send a copy thereof to the Respondent.

- (a) It is expected that \_\_\_\_\_ Court days will be required for the hearing of the abovementioned matter.
- (b) The services of an interpreter will/will not\* be required. The interpreter must be conversant in the following language/s:

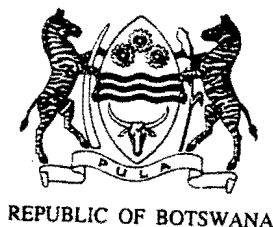
The attention of the parties is drawn to rule 8(2) which provides that the parties may not, without the leave of the Court, postpone or remove a matter from the roll within 2 weeks of the date of setdown, unless such matter has been settled.

When a postponement is sought prior to 2 weeks of the date of setdown the Registrar must be informed what the attitude of the other party is regarding such postponement.

Yours faithfully,

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

FORM IC. 8

---

NOTICE OF SETDOWN

---

Case No. IC \_\_\_\_/\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AND TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

The above matter has been enrolled for \_\_\_\_\_ at \_\_\_\_\_ (or as soon thereafter as the parties may be heard) at the abovementioned venue for:

---

(insert for what purpose, e.g. the hearing and determination of the above dispute, the hearing of the point in limine raised on the papers, a default judgment, the hearing of an application for rescission of a default judgment, the hearing of an application for the postponement of the matter, etc.)

The attention of the parties is drawn to rule 8(2) which provides that the parties may not, without the leave of the Court, postpone or remove a matter from the roll within 2 weeks of the date of setdown, unless such matter has been settled.

When a postponement is sought prior to 2 weeks of the date of setdown the Registrar must be informed what the attitude of the other party is regarding such postponement.

Parties must see to it that if they intend calling any witness or using any document in evidence which has not yet been filed at Court, that such witness and/or document is present at Court on the said date of hearing.

Yours faithfully,

REGISTRAR

cc: Commissioner of Labour

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

FORM IC. 9

---

CHANGE OF DATE OF SET DOWN

---

Case No. IC \_\_\_\_ / \_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The dispute between:

Applicant: \_\_\_\_\_

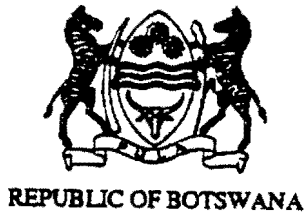
Respondent: \_\_\_\_\_

The above matter will no longer be heard on \_\_\_\_\_ 19 \_\_\_\_, but is now  
enrolled for a hearing on \_\_\_\_\_ 19 \_\_\_\_ at \_\_\_\_\_ (or as soon  
thereafter as the parties may be heard) at the abovementioned venue.

Yours faithfully,

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

FORM IC. 10

---

REQUEST TO FACILITATE SERVICE

---

Case No. IC \_\_\_\_ / \_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_ AND TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

The enclosed letter dated \_\_\_\_\_ 19 \_\_ addressed to the Respondent was returned undelivered to this Court. To facilitate service, kindly serve or have the enclosed letter served on the Respondent at its physical address and immediately file with the Registrar your return of service in terms of rule 6(4), which should also mention the Respondent's physical address.

Yours faithfully,

**REGISTRAR**

**Enc.**

**IN THE INDUSTRIAL COURT OF BOTSWANA**

**FORM IC. 11**

# TELEPHONE MEMO

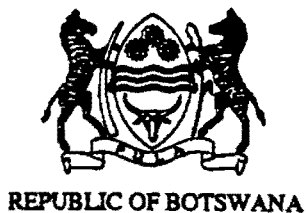
1. Case No.: \_\_\_\_\_ IC \_\_\_\_\_ / \_\_\_\_\_
2. Name of Respondent: \_\_\_\_\_
3. Date and time of call: \_\_\_\_\_
4. Name of Caller : \_\_\_\_\_
5. Tel. No. and code: \_\_\_\_\_
6. State what was discussed and/or agreed upon: \_\_\_\_\_

**SIGNATURE OF OFFICIAL RECEIVING CALL**

PLEASE PLACE THIS MEMO IN THE COURT FILE.



PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

**FORM IC. 12**

---

**COPY OF COURT ORDER**

---

Case No. IC \_\_\_\_/\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_ AND TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

Herewith a copy of the order made by the Court in the above matter. A judgment setting out the reasons for making such order will be forwarded to you in due course.

Yours faithfully,

**REGISTRAR**

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

FORM IC. 13

---

COPY OF JUDGMENT

---

Case No. IC \_\_\_\_/\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Herewith a copy of the judgment delivered by the Court in the following matter(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Yours faithfully,

REGISTRAR

**IN THE INDUSTRIAL COURT OF BOTSWANA**

**FORM IC. 14**

Case No.: IC \_\_\_\_\_ / \_\_\_\_\_

## LIST OF EXHIBITS

[illegible]

**IN THE INDUSTRIAL COURT OF BOTSWANA**

**HELD AT:** \_\_\_\_\_

**FORM IC. 15**

Case No. IC \_\_\_\_\_ / \_\_\_\_\_

Date: \_\_\_\_\_

In the matter between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

\_\_\_\_\_

**RESULT SHEET**

**CONSTITUTION OF THE COURT:**

Industrial Court Judge: \_\_\_\_\_

Nominated Member (Union): \_\_\_\_\_

Nominated Member (BOCCIM): \_\_\_\_\_

**ON BEHALF OF APPLICANT/S:**

\_\_\_\_\_

Of or instructed by: \_\_\_\_\_

Person in charge of case: \_\_\_\_\_

Tel. No. \_\_\_\_\_ Fax No. \_\_\_\_\_

**ON BEHALF OF RESPONDENT:**

\_\_\_\_\_

Of or instructed by: \_\_\_\_\_

Person in charge of case: \_\_\_\_\_

Tel. No. \_\_\_\_\_ Fax No. \_\_\_\_\_

[illegible]

Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

**INDUSTRIAL COURT JUDGE**

**NOMINATED MEMBER (UNION)**

**NOMINATED MEMBER (BOCCIM)**

IN THE INDUSTRIAL COURT OF BOTSWANA

FORM IC.16

Case No. IC. \_\_\_\_\_/\_\_\_\_\_

In the matter between:

Applicant:-----

Respondent:-----

SUBPOENA

(Issued under the provisions of Section 19(2) (b) of the Trade Disputes Act)

TO: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

You are hereby summoned to appear in person before the Industrial Court at Broadhurst Business Centre, corner of Bodungwe Road and Nelson Mandela Drive, Broadhurst Industrial Estate, Gaborone on \_\_\_\_\_ 20 \_\_\_\_ at \_\_\_\_\_ as well as on any subsequent day to which the proceedings may be postponed, to give evidence regarding the above matter and to bring with you and there to produce to the Court the books, documents or items specified here below:

[illegible]

Your attention is drawn to the provisions of Section 19 (4) of the said Act, which provides that any person who fails to comply with any instruction contained in this subpoena, shall be guilty of an offence and liable to a fine of 500 Pula and imprisonment for three months.

Given under my hand at Gaborone on this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_.

-----  
REGISTRAR, INDUSTRIAL COURT

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

---

FORM IC. 17

---

OATH OF OFFICE

---

Case No. IC. \_\_\_\_/\_\_\_\_

I \_\_\_\_\_ do hereby swear/solemnly and sincerely affirm and declare\* that I will, in my capacity as nominated member of the Industrial Court, administer justice to all persons alike without fear, favour or prejudice in the matter between:

---

\_\_\_\_\_  
Nominated member

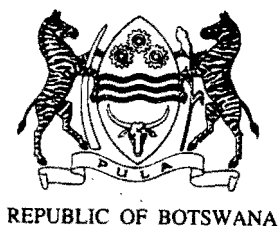
Signed and sworn to before me at \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ 19\_\_\_\_.

\_\_\_\_\_  
D. J. de Villiers  
Industrial Court Judge

\* delete whichever is not applicable



PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

FORM IC. 18

CONFIRMATION OF SELECTION OF ASSESSOR

Case No. IC. \_\_\_\_\_/\_\_\_\_\_

Date: \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AND TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear Sir/Madam,

Re: The Dispute between:

Applicant: \_\_\_\_\_

Respondent: \_\_\_\_\_

I hereby confirm that you have been selected, in terms of Section 17 (6) of the Trade Disputes Act, to sit with the Judge as an assessor in the Industrial Court in the above matter, which has been set down for a hearing at \_\_\_\_\_ on \_\_\_\_\_ of \_\_\_\_\_, 2001 at 09:30, before Judge \_\_\_\_\_.

Kindly arrange with your employer to release you from duties on the aforesaid days to enable you to attend the said hearing.

A copy of the Court pleadings in the above matter is enclosed for your information and attention/will be sent to you in due course.\*

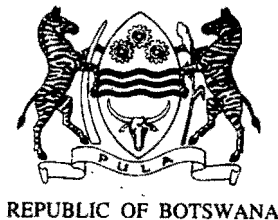
Yours faithfully,

K. P. Kalonda  
REGISTRAR, INDUSTRIAL COURT

\* delete whichever is not applicable

Enc.

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

FORM IC. 19

-----  
REMINDER TO FILE STATEMENT OF CASE  
-----

Case No. IC. -----/----

Date: -----

TO: -----  
-----  
-----

Dear Sir/Madam

Re: The Dispute between:

Applicant: -----

Respondent: -----

You referred the abovementioned dispute to this Court on \_\_\_\_\_, but you failed to file your statement of case. On \_\_\_\_\_ you were sent/given a letter drawing your attention to the provisions of Rule 4 (3), which requires that you file your statement of case at Court within 14 days after you have referred the dispute to this Court and at the same time you are also required to serve a copy of your statement of case on the Respondent.

You have not as yet filed your statement of case and if you fail to do so within one month hereof, the file will be closed.

Yours faithfully

REGISTRAR

cc: Respondent

Commissioner of Labour

PRIVATE BAG BR 267  
BROADHURST  
GABORONE  
TELEPHONE: (267) 300565  
TELEFAX: (267) 300567



REPUBLIC OF BOTSWANA

INDUSTRIAL COURT  
BROADHURST BUSINESS CENTRE  
UNITS 4 AND 5  
CORNER BODUNGWE ROAD  
AND NELSON MANDELA DRIVE  
BROADHURST INDUSTRIAL ESTATE  
GABORONE

FORM IC. 20

-----  
REMINDER TO FILE PROOF OF SERVICE  
-----

Case No. IC. -----/-----

Date: -----

TO: -----  
-----  
-----

Dear Sir/Madam

Re: The Dispute between:

Applicant: -----

Respondent: -----

You referred the abovementioned dispute to this Court on \_\_\_\_\_ and at the same time you also filed your statement of case.

There is however no indication whether you also served a copy of the said documents on the Respondent. Before this Court can commence to determine this dispute, the Court must be satisfied that a copy of your statement of case was properly served on the Respondent.

If it is at all possible please come and see me here at the Court as soon as possible or telephone me so that I can explain to you how service should be effected and/or how to file proof of service.

Should you fail to let us hear from you within one month hereof, the file will be closed.

Yours faithfully

REGISTRAR

cc: Respondent

Commissioner of Labour

**FORM IC. 21**

**WRIT OF EXECUTION**

**IN THE INDUSTRIAL COURT OF THE REPUBLIC OF BOTSWANA  
HELD AT GABORONE**

**CASE NO. IC.**

**IN THE DISPUTE BETWEEN**

**APPLICANT**

**AND**

**RESPONDENT**

To the Deputy Sheriff  
For the district of Gaborone

You are hereby directed to attach and take into execution the movable goods of the Respondent, ----- of (address), and of the same to cause to be realized by public auction the sum of -----, which the Applicant has recovered by judgment of this Court dated ----- day of -----, in the above-mentioned case, and also all your costs thereby incurred.

Further pay to the said Applicant or his attorney the sum or sums due to him/her with costs as above-mentioned, and for your so doing this shall be your warrant.

And return you this writ with what you have done thereupon.

Dated at Gaborone this       day of       2001.

-----  
REGISTRAR INDUSTRIAL COURT



the Minister may, whether the dispute has or has not been reported to the Commissioner under section 5 and whether the parties consent or do not consent to his doing so, refer the dispute to the **Industrial Court** (emphasis mine).<sup>109</sup> Where clarification or rectification of a Court decision was sought, the Minister or any party to the dispute may apply under the circumstances set out in section 26 (3).

### Urgent Applications in the Industrial Court

Prior to the 1997 amendments to the TDA, there was no specific provision that gave the Court the power to hear urgent applications. In the case of *Barclays Bank of Botswana Ltd v Botswana Bank Employees Union* an urgent application was brought to the Court against the Union and 2 others interdicting a countrywide strike.<sup>110</sup> In this matter the Respondents challenged the Court power to hear urgent applications on the basis that the requisite section 7 certificate had not been issued by the Commissioner. On the question of its powers to hear urgent applications, the Court had the following to say;

“The powers of the Court or any division of the Court, are set out *inter alia* in section 18(1) of the Trade Disputes Act, the relevant portions of which provide as follows:

The Court or any division of the Court, shall have exclusive jurisdiction in every matter properly before it under this Act and without prejudice to the generality of the foregoing, such jurisdiction shall include power-

(a).....

---

<sup>109</sup> Section 9 (1), *Trade Disputes Act, op. cit.*

<sup>110</sup> *Barclays Bank of Botswana Ltd. v Botswana Bank Employees Union* IC 40/94

- (b) to enjoin any employee or employer or any trade union or employer's organization from taking or continuing any industrial action;
- (c) .....
- (d) generally to give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.”<sup>111</sup>

The Court went further to interpret section 18 (6) as giving the Court a wide discretion as it provides:

“The Court shall regulate its own procedures and proceedings as it considers fit”<sup>112</sup>

In its reasoning the Court stated further that ‘when the Court has to make an order in terms of section 18 (1) (b) regarding industrial action, it is inconceivable that the legislature intended such disputes to follow the long procedure laid down for ordinary matters, as industrial action, if not taken in accordance with the provisions of the Act would be unlawful and is therefore a matter that must be dealt with expeditiously by the Court (section 18 (1) (d)) and the Court can decide on what procedure to follow (section 18 (6) ) to achieve such an expeditious determination’.<sup>113</sup> The Court was therefore satisfied that the Industrial Court had the power to hear urgent applications brought directly to the Court.<sup>114</sup>

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<sup>111</sup> Ibid  
<sup>112</sup> Ibid  
<sup>113</sup> Ibid  
<sup>114</sup> Ibid

The Industrial Courts' power to hear urgent applications was once again challenged in the Court of Appeal case of *Botswana Railways Organisation v Setsogo & 198 Others*.<sup>115</sup> This resulted in a new ground for referral being introduced in the 1997 Trade Disputes (amendment) Act with section 20 of the TDA being amended by adding at the end of subsection (2) the following new subsections-

(3) Notwithstanding the provisions of sections 4-9, a party to a trade dispute may make an urgent application to the Court for the determination of a trade dispute;

(4) An urgent application under subsection (3) shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies on for relief.

(5) The applicant shall set forth, in the affidavit, explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a mediation by the Commissioner in due course.<sup>116</sup>

Section 19 (1) states that the Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings.<sup>117</sup> This provision is targeted at reducing the number of delays that may arise from unnecessary technicalities. Section 18(d) of the TDA, further empowers the Industrial Court to 'do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it'.<sup>118</sup> This would include empowering the

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<sup>115</sup> *Botswana Railways Organisation v Setsogo & 198 Others* CA 51/95

<sup>116</sup> Section 20 (3) –(5), *Trade Disputes (Amendment) Act*, op. cit.

<sup>117</sup> Section 19 (1), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>118</sup> Section 18 (d), *Trade Disputes (Amendment) Act of 1992*, op. cit.



Industrial Court to make rules regarding its functions and the proceedings before it.

Section 159 (1) of the 1995 SA LRA establishes a Rules Board for the Labour Court for the purposes of regulating the conduct of the proceedings in the Labour Court.<sup>119</sup> The procedure to be followed in the Botswana Industrial Court is set out in the rules of the Industrial Court. These rules are geared to establishing simpler, speedier and less costly litigation. The preamble to the Industrial Court rules state the purpose of the rules as being ‘....to assist the Court in achieving the objectives of the TDA and when interpreting the rules, the Court will have regard to substance rather than form in order to dispense substantial justice between the parties.’<sup>120</sup> This purpose is reiterated in Rule 12(4) of the Industrial Court Rules. (At present the Rules have no force of law and have not been published. It is presently being proposed that the Judge President of the Industrial Court publish the rules after consultation with the Labour Advisory Board.)

#### 6. Remedies for unfair dismissal

Section 193 (1) and (2) of the SA LRA list the available remedies in the Labour Court as reinstatement, re-employment and compensation.<sup>121</sup> Section 193 (3) further provides that ‘where a dismissal is automatically unfair or, if a dismissal based on the employers *operational requirements* is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances. Sections 194 and 195 of the LRA deal with the amount of compensation awarded to a dismissed employee, with section 194 setting out the

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<sup>119</sup> Section 159 (1), 1995, SA LRA, op. cit.

<sup>120</sup> *Preamble to the Industrial Court Rules (Botswana)*

<sup>121</sup> Section 193 (1) & (2), 1995 SA LRA, op. cit.

limits on compensation. The maximum that can be awarded to a dismissed employee is the equivalent of 24 months remuneration *calculated at the employees' rate of remuneration on the date of dismissal*.<sup>122</sup> For an employee to qualify for this amount the dismissal must have been found to have been *automatically unfair*.

Section 24 (1) of the Trade Disputes (amendment) Act of 1992 provides the following;

“In any case where the Court determines that an employee has been wrongfully dismissed or disciplined, the Court may, subject to its discretion to make any other order which it considers just-

(a) in the case of wrongful dismissal, order reinstatement of the employee, with or without compensation, or order compensation in lieu of re-instatement; or

(b) in the case of wrongful disciplinary action, order the payment of such compensation as it considers just: Provided that-

(i) compulsory re-instatement as a remedy for wrongful dismissal should only be considered-

(a) where the termination was found to be unlawful, or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or grievance, or religious, tribal or political affiliation (this section is similar to sections 5, 187 (1) and 187 (f) of the SA LRA); or

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<sup>122</sup> Section 193 (3), 1995 *SA LRA*, op. cit.

- (b) where the employment relationship has not irretrievably broken down; and
- (ii) in a case where re-instatement is ordered, any compensation ordered shall not exceed the actual pecuniary loss suffered by the employee as a result of wrongful dismissal, and in any other case, any compensation ordered shall not exceed **six months monetary wages**.

(2) In assessing the amount of compensation to be paid under subsection (1), the Court may take the following factors into account-

- (a) the actual and future loss likely to be suffered by the employee as a result of the wrongful dismissal;
- (b) the age of the employee;
- (c) the prospects of the employee in finding other equivalent employment;
- (d) the circumstances of the dismissal;
- (e) the acceptance or rejection by either the employer or the employee of any recommendations made by the Court for the re-instatement of the employee;
- (f) whether or not there has been any contravention of the terms of any collective agreement or any law relating to employment by the employer or the employee;
- (g) the employers' ability to pay

Section 24 (3) of the Trade Disputes (Amendment) Act of 1992 addresses terminations of contracts of employment by the **employee**. The section provides that “ Where a contract of employment is wrongfully terminated by an employee, the Court may make such order of compensation in favour of the **employer** as is considers just:

Provided that in no case shall such order of compensation exceed **six months monetary wages**.

#### 7. Appeals & Reviews

In the absence of a Labour Court of Appeal, section 18(4) of the TDA provides that the right of appeal against a decision of the Industrial Court lies with the Court of Appeal of Botswana.<sup>123</sup> The section does not set out the instances or circumstances in which a matter may be referred to the higher judicial body. The Court has, however, in practice, referred matters to the High Court on its own motion (eg, constitutional matters) and to the Court of Appeal for determination of questions of law. One of the shortcomings noted with the present system is that appeals of the Industrial Court lie with the Court of Appeal. Most jurisdictions provide for appeals from Labour Courts to lie in the Labour Court of Appeal. Section 166 (1) of the SA LRA provides that;

“Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.”<sup>124</sup>

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<sup>123</sup> Section 18 (4), *Trade Disputes (Amendment) Act of 1992*, op. cit.

<sup>124</sup> Section 166 (1), *1995, SA LRA*, op. cit.

The importance of having Labour Appeal Courts lies in the fact that Labour Courts are considered to be specialist Courts. Advocates of Labour Appeal Courts argue that there is little sense in referring a dispute from a specialist Labour Court to a non-specialist Court of Appeal. Consequently, recommendations have now been made that the legislation be amended to provide;

- (a) provision for the appointment of a labour law specialist to the panel of the Court of appeal judges;<sup>125</sup> and
- (b) provision for a labour law judge to sit on appeals emanating from the Industrial Court.<sup>126</sup>

#### Powers of Review

The legislation is silent as to the powers of review relating to Industrial Court decisions. In the absence of a Labour Court of Appeal, the Constitution and Court of Appeal Act need to give the Court of Appeal inherent jurisdiction to review any decision of the Industrial Court. It is vital that the Industrial Court have the benefit of scrutiny by an appellate body that would enhance its stature and help maintain its standards.

#### 8. Conclusion

It is clear that there were a number of omissions and anomalies within the Trade Disputes (Amendment) Act of 1992. The Act was not well drafted and it bogged down the Industrial Court with many technical arguments. The 'teething' problems experienced by the Botswana Industrial Court, were to a large extent,

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<sup>125</sup> ILO/Swiss Project, *Draft Outline*, op. cit. p 17

<sup>126</sup> Ibid

similar to those experienced by the previous Industrial Court of South Africa. Whilst much of the SA Industrial Courts' problems revolved around the concept of an 'unfair labour practice', the Court also experienced some jurisdictional problems. Frequent legislative intervention was required to enable the Industrial Court of South Africa to function as intended. In a similar vein, fundamental changes to the Trade Disputes (Amendment) Act were required to enable the Industrial Court of Botswana to function as envisaged. In spite of the many hindrances, however, the Industrial Court was able to determine a number of relevant cases. Three important trends emerge from the early decisions of the Court;

- the Industrial Court insists that the statutory procedures relating to conciliation and mediation be exhausted before the parties can approach the Industrial Court for relief;
- the Industrial Court demonstrates a clear intention to depart from the rigid formalism of the ordinary courts; and
- the Industrial Court also recognizes that it is a creature of statute and subject to limitations. Where the Act is silent, however, the Court tends to assume wide discretionary and quasi-judicial powers that enable it to function effectively.

## **CHAPTER FIVE: Assessment of the Industrial Court's Decisions from a Labour Relations Perspective**

### **1. Introduction**

The procedures of ordinary courts have been declared too formal and cumbersome to handle the rapid developments in labour relations.<sup>1</sup> As a general rule specialized Labour Courts are expected to be accessible, speedy, efficient and informal.<sup>2</sup> This chapter endeavours to examine the general efficiency of the Industrial Court of Botswana.

### **2. ACCESSIBILITY**

The question of accessibility is multi-dimensional. In general parties should have easy access to the dispute resolution system. Pertinent considerations under this heading include legal, geographical and financial accessibility of the dispute settlement machinery to the parties.

#### **2.1 Legal accessibility**

In Britain, a minimum of one years' service is required to access certain statutory employment rights.<sup>3</sup> Employment rights can only be accessed from the very beginning if they fall within certain categories, ie; discrimination on grounds of sex, race or disability.<sup>4</sup> Placing such legal time limitations creates a barrier that can be liable or open to abuse and manipulation. Many employers would seek to

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<sup>1</sup> Mischke C. *(Re)Inventions- Reflections Upon Entering a New System of Dispute Resolution*, in Labour Dispute Resolution, Brand J. et al , p 18

<sup>2</sup> Ibid p 19

<sup>3</sup> Corby S. & Newall I., *Unfair Dismissal in South Africa: comparative perspectives from Great Britain and New Zealand*, unpublished paper, 12<sup>th</sup> Annual Labour Conference, 30 June-2<sup>nd</sup> July, Durban, SA., p 4

<sup>4</sup> Ibid p4

challenge an employees' continuous service under this provision. In South Africa employee rights start from the first day of employment. Section 5 of the SA LRA even goes as far as to protect **persons seeking employment**.<sup>5</sup> In Botswana employee rights are accessed from the very beginning.<sup>6</sup> No minimum statutory limitations have been set out to limit an employees right of access to employment rights. The Industrial Court has however, deliberated on a case in which the Respondent employer challenged the *employees continuous service*. In the case of *Thono Pilane v Willy Kathurima Associates (Pty) Ltd.*<sup>7</sup> the applicant had been authorized to take a years study leave. The issue to be determined by the Court, related to the calculation of severance pay. The Respondent denied any obligation to pay severance benefits to the Applicant, on the ground that the Applicant was on study leave and not in the employ of the Respondent. The Court held that authorized absence from work does not interrupt continuous employment and accordingly held the Respondent liable to pay severance benefits.<sup>8</sup>

#### 2.1.1 Legal accessibility-Who is an employee?

The question of who is an employee is also relevant to the accessibility of the dispute settlement machinery. In Great Britain, New Zealand and South Africa, only employees can make use of the unfair dismissal procedures.<sup>9</sup> The question of who is an employee, however, is left to the arbitrator/adjudicator to determine on the facts.<sup>10</sup> The British tribunals usually rule out atypical workers, including home-

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<sup>5</sup> Section 5, 1995 SA LRA, op. cit

<sup>6</sup> See: *Employment Act, Botswana*

<sup>7</sup> *Thono Pilane v Willy Kathurima & Associates (Pty) Ltd.* IC 98/85

<sup>8</sup> *Thono Pilane case*, op. cit.

<sup>9</sup> Corby s., & Newall I., unpublished paper, op. cit. p 4

<sup>10</sup> Ibid p 4



workers<sup>11</sup> but this is likely to change in light of the global trend towards atypical employment. Section 213 of the 1995 SA LRA specifically excludes independent workers from the definition of an 'employee'.<sup>12</sup> In addition the SAS, South African Defence Force (SANDF) and National Intelligence Agency (NIA) are excluded from the Act.<sup>13</sup>

In Botswana, an employee has been defined in section 2 (1) of the **Employment Act (Cap: 47: 01, Laws of Botswana)** to mean;

“any person who has entered into a contract of employment for the hire of his labour:

Provided that the expression shall not include any officer or servant of the government unless he belongs to a category of such officers or servants the members of which are declared by the Minister under the Employment Act to be employees for the purposes of that Act.”<sup>14</sup>

Section 2 (1) of the Trade Disputes Act contains an almost identical definition of an 'employee'.<sup>15</sup> In the case of *Selefa Ditshwane v Botswana Railways Organisation*<sup>16</sup> the court said that the two definitions were for all *practical purposes the same* and were also interlinked. In this matter, the applicant, an employee of the Botswana Railways Organisation, made a protest against the termination of his employment as per section 5 (6) (d) of the TDA. The court ruled that the definitions contained in section 2(1) of the TDA and Employment Act make it patently clear that *an*

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<sup>11</sup> Ibid p 4

<sup>12</sup> Section 213, *Definition section, 1995 SA LRA*, op. cit.

<sup>13</sup> See also: section 213 , *1995, LRA*

<sup>14</sup> Section 2 (1), *Employment Act, Cap 47:01, Laws of Botswana*, op. cit.

<sup>15</sup> Section 2 (1), *Trade Disputes Act, Cap: 48:01, Laws of Botswana*, op. cit.

<sup>16</sup> *Selefa Ditshwane v Botswana Railways Organisation*, IC 90/95

*officer or servant of the Government cannot be an employee for the purposes of the Trade Disputes Act unless he belongs to a category of public servants who have been declared by the Minister to be employees for the purposes of the Employment Act.*<sup>17</sup> The court ruled that the Botswana Railways Organisation was part of the Government of Botswana and further that the Applicant was an officer or servant of the Government of Botswana. Consequently the Applicant was found to not be an employee as defined in the Employment Act and Trade Disputes Act. Agricultural workers and domestic workers are also excluded from the ambit of the legislation guaranteeing employment security. In another decision of the Industrial Court, *Edrogon Cahit v Musto Olmez (Pty) Ltd.*<sup>18</sup>, the court held that Directors and shareholders are not employees.

## 2.2 Accessibility-Financial barriers

A general 'rule-of thumb' of the 'ideal dispute resolution system is that it should be relatively inexpensive.<sup>19</sup> Whilst dispute resolution systems are required to be inexpensive, they can never be entirely free. The costs of running the institutions must be borne by either the parties or some institution (in most cases the State) It's important to note that a balance must be struck between 'the efficient way in which the dispute resolution system operates and the costs involved in the efficient running of the system.'<sup>20</sup> In certain jurisdictions 'user fees' provide a form of financial barrier. In Great Britain and South Africa there are generally no fees payable, whereas in New Zealand parties are required to pay fees at every stage.<sup>21</sup> In New Zealand, fees must be paid for an application to the Tribunal, for

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<sup>17</sup> *Selefa Ditsheane case*, op. cit.

<sup>18</sup> *Edrogon Cahit v Musto Olmez (Pty) Ltd.* IC 89/95

<sup>19</sup> Mischke C., op. cit. p 24

<sup>20</sup> Ibid at 24

<sup>21</sup> Corby S. & Newall I, op. cit. at 4

an adjudication hearing, for an appeal and for an appeal hearing per half day after the first day.<sup>22</sup>

User fees are generally thought of as being undesirable in so far as they tend to be restrictive and prohibitive. At present, no user fees are payable in the Botswana Industrial Court. The majority of the users and potential users of Labour Courts do not often have the necessary financial means to access the justice system. This is particularly true of many of the countries within the SADC region. Consequently, it has been suggested that fee requirements are to be rejected and discouraged for being impractical and unrealistic.

At one stage, South Africa was considering implementing an alternative that would require an individual to register a down payment or refundable deposit.<sup>23</sup> This alternative was being considered as a means of discouraging the many unnecessary cases that come before the CCMA. The CCMA also felt that they could improve on the quality of arbitration service by requiring a more stringent screening on a tariff of fees.<sup>24</sup> The tariff is therefore intended to 'create a small hurdle for people to think about before referring disputes to the CCMA'.<sup>25</sup> A crucial element to consider prior to the introduction of user fees is whether or not this 'financial barrier' will affect the people who need it most. It is suggested that Botswana is not the best country to employ this kind of barrier. This is because the mediation and conciliation processes alone, may take up to six months or more. A further six or more months may elapse before an individual obtains relief from the Industrial Court.

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<sup>22</sup> Corby S.& Newall I., op. cit. at 5

<sup>23</sup> Mosime K., *CCMA: Achievements & Challenges*, presentation, 12<sup>th</sup> Annual Labour Law Conference, 30th June-2<sup>nd</sup> July, 1999, Durban, South Africa at p 98

<sup>24</sup> Ibid p98

<sup>25</sup> ibid p 98

### 2.3 Financial barriers- Costs

The awarding of costs can be an additional financial burden on the losing party and this is particularly the case where the legal aid structure of a country is inadequate. In countries like New Zealand, legal aid may assist in defraying fees and costs and in rectifying the imbalances between the applicant and the respondent in terms of their representation.<sup>26</sup> In Great Britain the Tribunal Regulations provide that costs are only awarded if *a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably* (emphasis mine).<sup>27</sup> This is a very high test. In South Africa, however, costs are only awarded in arbitration for *frivolous or vexatious behaviour* but in the Labour Court and Court of Appeal, the courts have a broader discretion in awarding costs. Sections 162 and 179 of the SA LRA are identical in their wording. Subsections (1), (2) and (3) provide that;

(1)“ The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of *this Act* and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties-

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<sup>26</sup> Corby S. & Newall I., op. cit. p5

<sup>27</sup> Ibid

- (i) in proceeding with or defending the matter before the Court; and
- (ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the *dispute* or against any person who represented that party in those proceedings before the Court.<sup>28</sup>

A similar approach has been adopted in Botswana. Each party is generally required to bear its own costs. Costs are only awarded in two instances;

- (a) where one party agrees to pay the other party's costs, e.g. wasted costs where one party seeks a postponement; and
- (b) in terms of the Industrial Court Rules and Trade Disputes Act. Rule 17 (2) (e)<sup>29</sup> of the Industrial Court Rules gives a Judge a certain amount of discretion to "make such order as to the costs of the case as he deems fit, if such costs are **permissible in terms of section 27 of the Act** (emphasis mine). In addition section 27 of the TDA provides that;

"No costs shall be awarded by the Court except against a party held by it to have acted **frivolously or vexatiously**, (emphasis mine) or with deliberate delay in the bringing or defending of a proceeding, but where costs are awarded the tariff of costs laid down from time to time under the rules of the High Court shall apply *mutatis mutandis* in respect of costs awarded by the Court."<sup>30</sup>

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<sup>28</sup> Section 162 (1), (2), (3) & Section 179 (1) (2) & (3), 1995 SA LRA, op. cit.

<sup>29</sup> Section 17 (2) (e), Appendix C, *Industrial Court Rules*

<sup>30</sup> Section 27, *Trade Disputes Act*

The Court has awarded costs in very few cases. To date the Court has only awarded costs in a total of 15 cases.<sup>31</sup> In *Barclays Bank of Botswana Ltd. v Botswana Bank of Employees Union & Others*<sup>32</sup>, the Court was asked to deliberate on whether the Bank had been declared an essential service. The Court considered the action to be *frivolous and vexatious* in that 'a list of essential service providers had been gazetted by the Minister listing all banks as essential service providers.'<sup>33</sup> Consequently the Union was aware, at the time of making its application to the Court, that they had been included in the list of essential service providers. The Court therefore, elected to award costs against the Union because 'they knew they had no leg to stand on.....and stubbornly and defiantly proceeded with their ill-founded opposition right to the end'<sup>34</sup> (de Villiers JP, as he was then).

### 2.3 Geographic accessibility

An ideal dispute resolution system must be geographically accessible. In South Africa bargaining councils are usually located close to the industries which are represented on the council. The CCMA has nine offices, one in each province and its Commissioners often travel to the outlying areas.<sup>35</sup> In comparison, Botswana has offices of the department of labour situated throughout the country but the Industrial Court is only situated in the capital city, Gaborone. Gaborone is situated in the southern part of Botswana. Consequently, it has been suggested that the Court only services (or is accessible to) those in the southern part of Botswana. In 1995, however, the Court started to go on Circuit Court to Francistown every three months to service the northern part of the country. As

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<sup>31</sup> Interview with Industrial Court Judge de Villiers, July 16<sup>th</sup>, 2001, Gaborone, Botswana

<sup>32</sup> *Barclays Bank of Botswana Ltd. v Botswana Bank Employees Union* IC 40/94

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> <http://www.ccma.org/.html>

of April 2001 the Court has been going on Circuit every two months (6 X's a year). Currently the Court has not handled more than 30 cases a year on average from the Northern region (see **Table 1 below**). At present, however, there are not enough cases to justify the establishment of a permanent Court in Francistown. Plans are however, being currently made to establish a permanent Labour Court in Francistown in the near future.

**TABLE1** <sup>36</sup>

**Cases before the Industrial Court of Botswana, 1994-31<sup>st</sup> July, 2001**

<b>YEAR</b>	<b>Total Cases Registered</b>	<b>Circuit Court Cases</b>
1994	40	-
1995	118	-
1996	221	6
1997	92	22
1998	184	5
1999	266	15
2000	261	29
2001	199	20

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<sup>36</sup> Cases before the Industrial Court 1994- July 31<sup>st</sup>, 2001, *Industrial Court Register*, August, 5, 2001, Gaborone, Botswana.

#### 2.4 Accessibility- Internal Procedures

The accessibility of a dispute resolution system is also concerned with the ease of reporting or instituting a case of unfair dismissal. Users of the system must be able to use the system and internal efficiencies should be relatively simple and well organized. Procedures in New Zealand have been criticized as being comparatively complex.<sup>37</sup> The Tanzanian process has also been described as very *litigious* one.<sup>38</sup>

Complex procedures are to be discouraged in that they act as barriers to employees who are neither well educated nor represented. In contrast, applications made in South Africa to the bargaining councils and CCMA are by way of simple form with the onus being placed on the employee to serve the employer with a copy. The Industrial Court has followed a similar approach to that of South Africa. The Trade Disputes Act was amended to provide for easier reporting at the district labour officer level. As previously stated, the requirement under section 5 (2) (a) of the Trade Disputes (Amendment) Act that the report be made in writing was waived, leaving room for reports to be made verbally.

#### Form and Content of Process- Industrial Court

The form and content of process is set out in Rule 4 of the Industrial Court Rules.<sup>39</sup> Essentially any party may register a case with the Industrial Court if he has;

- (a) complied with the provisions of section 5(6) of the 1992 Trade Disputes (Amendment) Act; and

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<sup>37</sup> Corby S. & Newall I., op. cit. at 5

<sup>38</sup> Christie S. & Madhuku L., op. cit. at 11



(b) been issued with a section 7 certificate by the Commissioner of Labour

An Applicant is then required to bring a letter of referral<sup>40</sup> along with the issued section 7 certificate<sup>41</sup>, (where applicable), to the Court registry and this will be deemed to be a proper referral of such dispute to the Industrial Court case. The party may simultaneously with the delivery of such letter of referral (or 14 days thereafter), file with the Registrar, a statement of case, as near as may be in accordance with Appendix 1<sup>42</sup> to these Rules, and serve a copy thereof on the **Respondent**, which statement of case shall:

- (a) be signed by the party by whom it is delivered;
- (b) contain in full the title of the matter, the names of the parties and where possible, the number assigned by the Registrar to the matter at the head of such statement;
- (c) contain clear and concise particulars relevant to the unresolved trade dispute and any further material facts on which the applicant relies for the relief sought;
- (d) be divided in paragraphs including subparagraphs, in respect of content, which paragraphs shall be consecutively numbered and which shall, as near as possible, each contain a distinct averment;
- (e) set out clearly the nature of relief sought;

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<sup>39</sup> Rule 4, Appenic C *Industrial Court Rules*, op. cit., p 6

<sup>40</sup> See: Appendix D, *Form IC.1, Letter of referral, Rule 4(1) & 4 (2), Industrial Court Rules*

<sup>41</sup> Section 7 certificate from the Commissioner of Labour as per Section 7 of the *Trade Disputes (Amendment) Act of 1992*

<sup>42</sup> See: Appendix C, *Industrial Court Rules*, p19

- (f) contain an address at which the Applicant will accept service of process in the proceedings;
- (g) contain a notice that if the other party (the Respondent):
  - (i) intends opposing such application, he is required within 14 days after delivery of the said statement of case, to deliver a reply referred to in sub-rule (5);
  - (ii) fails to deliver such reply, a determination, including an order as to costs, may be made in his absence;
- (h) contain a list of books and documents relevant to the application, which are in the Applicant's possession or under his control.<sup>43</sup>

Rules 4 (5) and 4 (6) of the Industrial Court Rules contain the form and content of process as it relates to Respondents.<sup>44</sup> Rule 5 stipulates that a Respondent intending to oppose the application shall within the 14 day period, file with the Registrar, a statement of defence, as near as may be in accordance with Appendix 2<sup>45</sup> to these Rules and serve a copy thereof on the Applicant, which statement of defence shall:

- (a) set out clearly and concisely the grounds of opposition and the material facts relied upon in support of such grounds;
- (b) comply with all the requirements set out in subrules (4) (a), (b), (d) and (f);

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<sup>43</sup> Rule 4 (a) –(h), Appendix C *Industrial Court Rules*, op. cit p 6

<sup>44</sup> See: Rule 4(5) & 4 (6), Appendix C, *Industrial Court Rules*, p 6

<sup>45</sup> See Appendix C, *Industrial Court Rules*, p 22

- (c) contain a list of books and documents relevant to his opposition and any relief he may seek which are in the Respondent's possession or under his control.<sup>46</sup>

Rule 4 (6) further provides that a Respondent intending to counterclaim shall simultaneously with his statement of defence deliver a statement which shall:

- (a) contain clear and precise particulars relevant to his counterclaim and any further material facts on which he relies for the relief sought;
- (b) comply with all the requirements set out in sub-rules (4) (a), (b), (d), (e), (f) and (g), which allow the Applicant 14 days within which to reply to the Respondent's counter claim statement.<sup>47</sup>

Rule 4 (9) provides that, any late delivery of a statement of case or statement of defence, may be condoned by the Court on good cause shown in terms of Rule 12 (1) (a).<sup>48</sup> Rule 5 (1) sets out the manner of filing process with the Registrar. Such process may take place by hand, registered post, telefax or other electronically printed manner.<sup>49</sup>

At first glance the procedures of the Botswana Industrial Court may seem to be slightly complex. It is important, however, to bear in mind that the Court has already prepared and available standard forms relating to the form and content of process. All that is required of the parties, therefore is to fill in their particulars on the supplied forms.

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<sup>46</sup> See: Rule 5, Appendix C, *Industrial Court Rules*, op. cit p 7

<sup>47</sup> See: Rule 4(6), Appendix C, *Industrial Court Rules*, op. cit. p 7

<sup>48</sup> See: Rules 4 (9) and 12 (1) (a), Appendix C, *Industrial Court rules*, op. cit p 7

<sup>49</sup> See: Rule 5 (1), Appendix C, *Industrial Court Rules*, op. cit. p7

## 2.5 Accessibility- Time Limits

The accessibility of a dispute resolution system is also determined by the time limits implemented in the system. In New Zealand a time limit of 90 days was established for the grievant to notify the employer and the employer was given 14 days to respond.<sup>50</sup> If the time limit is observed, the grievant has up to six years to apply to the tribunal.<sup>51</sup> The effect of this provision is that the employment Tribunal may be dealing with a matter that is several years old. It is suggested that this method does not fit in with the normal concept of justice (especially as it relates to labour disputes). In contrast, in Great Britain the Conservative Government established in the 1970's, a time limit of four weeks, and this was later extended under the Labour Government to three months.<sup>52</sup> In South Africa there is a time limit of thirty days from the date of dismissal to the time of application unless the employee shows good cause for not having done so.<sup>53</sup> In Botswana there is a time limit of 14 days from the date of dismissal to the application made before the district labour officer.<sup>53</sup> The new section 6 A (3) states that condonation for a late application, may be made where there is good cause by a labour officer, the Commissioner of Labour or the Industrial Court.<sup>54</sup>

## 3. SPEED

An efficient dispute resolution system needs to aim to resolve disputes once properly notified. In Great Britain, conciliation under **ACAS** may take place from

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<sup>50</sup> Corby S. & Newall I, op. cit., at 6

<sup>51</sup> Ibid at 6

<sup>52</sup> Ibid at 6

<sup>53</sup> Section 19(2), 1995 SA LRA, op. cit.

<sup>53</sup> Section 6 A (3), *Trade Disputes Act*, op. cit

<sup>54</sup> Ibid

any time up until the tribunal hearing.<sup>55</sup> The majority of single cases (over 80%) were brought to a hearing within 6 months in 1997/8.<sup>56</sup>

Section 135 of the SA LRA deals with the resolution of disputes through conciliation.<sup>57</sup> Under section 135 (2) a Commissioner of the CCMA must 'attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral.'<sup>58</sup> (This period may be extended with the consent of the parties).<sup>59</sup> Studies recently conducted show that with arbitration, most provinces dispose of their cases within 3-4 months.<sup>60</sup> Speed is a particularly crucial factor for the South African dispute resolution machinery since compensation for procedurally unfair dismissal is calculated from the time of dismissal to the date of the arbitration hearing.<sup>61</sup>

In Botswana there are no provisions relating to the specific time within which a dispute must be settled. At the level of the Labour Department, section 7 of the Trade Disputes Act provides that a dispute be resolved within a **reasonable time** (emphasis mine) but does not specifically stipulate what is considered to be reasonable.<sup>62</sup> The Act makes no reference to any time limitations in respect of the Court. The Court, does however, attempt to provide for speedy settlement. At present, the length of time 'between declaration of the dispute to final disposition' by the Court, is on average 12 months. This compares favourably

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<sup>55</sup> Corby S., & Newall I., op. cit at 6

<sup>56</sup> *Employment Tribunals Service, 1998*

<sup>57</sup> Section 135, 1995 SA LRA op. cit

<sup>58</sup> Section 135 (2), 1995 SA LRA, op. cit.

<sup>59</sup> Ibid

<sup>60</sup> Theron J. & Godfrey S., *The CCMA and Small Business- the results of a pilot study* (2000) 21 ILJ 53 at 63

<sup>61</sup> Section 194 (1), 1995 SA LRA, op. cit

<sup>62</sup> Section 7, *Trade Disputes Act*, op. cit.

with other courts in the region, which dispose of their cases in an average period of three years.

During the years 1995-1997,<sup>63</sup> the Court was inundated with cases and it handled the cases by requesting appointments of Acting Judges for short periods.<sup>64</sup> This way, the Court successfully managed to avoid any backlog of cases.<sup>65</sup> Upon realizing that the cases coming before the Court were on the increase, the President of Botswana, in 1998, appointed a second Judge<sup>66</sup> and later in 1999 a third Judge.<sup>67</sup> At present, consideration is being given to appointing a fourth Judge. The Court has also made provision for the speedy determination of disputes in Rule 9 of the Industrial Court Rules. Rule 9 makes provision for a pre-hearing conference to be presided over by a Judge, the Registrar or a nominated member of the Court.<sup>68</sup> Rule 9 (4) further provides that such presiding officer may also act as a **mediator** or **conciliator**.<sup>69</sup> Rule 9 (1) requires that the request for a pre-hearing conference be made by the Court.<sup>70</sup> Rule 9 (2) sets out the procedure for the pre-conference hearing and provides that;

“At such conference, without prejudice to the rights of the parties, consideration may be given to the following matters:

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<sup>63</sup> See: Table 2 & Table 3 which reflect the number of disputes before the Industrial Court.

<sup>64</sup> Interview with Industrial Court Judge D. de Villiers, July 16<sup>th</sup>, Industrial Court, Gaborone, Botswana

<sup>65</sup> Ibid

<sup>66</sup> Judge M.E Ebrahi-Cartens

<sup>67</sup> Judge E.J.W.M. Legwaila

<sup>68</sup> Rule 9, Appendix C, *Industrial Court Rules*, op. cit.

<sup>69</sup> Rule 9 (4), Appendix C, *Industrial Court Rules*, op. cit.

<sup>70</sup> Rule 9 (1), Appendix C, *Industrial Court Rules*, op. cit.

- (a) any means whereby the dispute may be settled, inclusive of such previous endeavours as have been made by the parties to settle the dispute by agreement or otherwise;
- (b) any agreement as to the nature and extent of the unresolved issues;
- (c) such facts as are common cause or are admitted by any party;
- (d) any steps which may shorten the hearing;
- (e) discovery or exchange of documents;
- (f) the manner in which documentary evidence is to be dealt with;
- (g) whether evidence on affidavit is to be admitted;
- (h) which party shall begin;
- (i) the necessity or otherwise for an on-the-spot investigation;
- (j) securing the presence at court of any witness; and
- (k) any other matter or means whereby the proceedings may be shortened.<sup>71</sup>

#### **4. FORMALITY**

Dispute resolution systems need to be specially adapted to be user friendly and relatively informal.<sup>72</sup> Many of the Applicants/Users of the system often come from the more disadvantaged sectors of society and may be intimidated at the prospect of bringing a case to court. The need for informality was emphasized in

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<sup>71</sup> Rule 9 (2) (a)- (k), Appendix C, *Industrial Court Rules*, op. cit

<sup>72</sup> Mischke M., *A new System of Dispute Resolution*, op. cit. p 20

the South African cases of *Metal and Allied Workers Union (MAWU) & Ano. v A. Mauchle (Pty) Ltd. trading as Precision Tools*<sup>73</sup> and *Federated Trust Lt. V Botha*<sup>74</sup> where the Court stated;

*“The Court does not encourage formalism in the application of the (Magistrate’s Court) Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts”.*

It is for this same reason, that the South African government has repeatedly argued that informality is one of the benefits over court adjudication. The need for informality also explains the global trend towards Alternative Dispute Resolution (ADR) which tends to be less costly and less informal than adjudication.

Mischke, in his article “(Re)Inventions- Reflections Upon Entering a new system of Dispute Resolution”, advocates for informality but warns against dispute resolution institutions or resolvers ‘throwing.....all caution to the winds and proceeding in a rough and ready manner to do everything they perceive necessary to resolve the dispute’.<sup>75</sup> Mischke further warns that, in as much as informality is the ‘ideal of a perfect system of dispute resolution, it should never be seen as the justification for ignoring the parties, their needs and their rights.’<sup>76</sup> According to Mischke, informal proceedings, do not mean ‘disorderly or unstructured proceedings, nor does an ideal of informality, efficiency or expeditiousness justify ignoring the interests, actual needs and rights of the parties

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<sup>73</sup> ILJ 1980, Vol. 1, Part 3, p 227

<sup>74</sup> 1978 (3) SA 645 (A)

<sup>75</sup> Mischke M., op. cit. p 22

<sup>76</sup> Ibid p 21



to the dispute.<sup>77</sup> He draws attention to section 138 of the SA LRA which he maintains *balances considerations of fairness and justice on one hand, and the countervailing considerations of fairness and justice on the other hand*.<sup>78</sup> Section 138 sets out the manner in which a CCMA Commissioner is expected to conduct an arbitration hearing. The section provides that;

- *"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."*<sup>79</sup>

It is suggested that in dealing with the *substantial merits of the case*, parties must be given ample opportunity to state their case and to question any opposing version given. In general the degree of formality in an institution centers around five issues, namely;

- whether the arbitrator/adjudicator is legally qualified;<sup>80</sup>
- whether legal representation is allowed;<sup>81</sup>
- whether the approach of the institution is adversarial or investigative;<sup>82</sup>
- the amount of documentation involved;<sup>83</sup>

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<sup>77</sup> Ibid at 21

<sup>78</sup> Ibid at 21

<sup>79</sup> Section 138, 1995, SA LRA, op. cit.

<sup>80</sup> Corby S., & Newall I. op. cit. at 6

<sup>81</sup> Ibid at 7

<sup>82</sup> Ibid at 7

<sup>83</sup> Ibid at 7

- whether there is an appeal.<sup>84</sup>

### Formality-

#### 4.1 (i) Legal qualifications

The question of legally qualified adjudicators is dealt with differently in different jurisdictions. Lord Wedderburn criticizes the use of legally qualified adjudicators as they tend to have 'common law habits, training and traditions' which may lead to a *legal approach* rather than an *industrial relations approach*.<sup>85</sup>

Section 118 (1) (a) of the SA LRA requires the **Director of the CCMA** to be skilled and experienced in labour relations and dispute resolution.<sup>86</sup> Section 117 of the LRA, however, does not require CCMA arbitrators, to be legally qualified.<sup>87</sup> Section 153 (2) of the LRA, however, requires that Labour Court Judges have *knowledge, experience and expertise in labour law*<sup>88</sup> (emphasis mine). Other jurisdictions have a similar approach and recognize the area of labour law to be a specialist area of law requiring a specialist approach. In Great Britain, the tribunal Chairman must be legally qualified but may sit with lay members with industrial relations experience, one representing employers and the other representing employees.<sup>89</sup> This approach is representative of most jurisdictions in Africa, particularly those in the SADC region. In Botswana section 17 (3) provides that

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<sup>84</sup> Corby S. & Newall I., op. cit at 7

<sup>85</sup> Wedderburn, *Labour Law: from here to autonomy*, op. cit at 3

<sup>86</sup> Section 118 (1) (a), 1995, SA LRA, op. cit.

<sup>87</sup> Section 117, 1995, SA LRA, op cit.

<sup>88</sup> Section 153(2), SA LRA, op cit.

<sup>89</sup> Corby S. & Newall I., op. cit. at 6

Industrial Court judges are to be appointed from among persons possessing the qualifications to be *puisne* judges of the High Court as prescribed in section 96 (3) of the Constitution.<sup>90</sup> Under section 96(3) of the Constitution a person shall only qualify to be a judge if they ‘hold, or have held office, as a judge of a court....’ or alternatively if they have been ‘qualified to practice as an advocate for not less than five years.’<sup>91</sup> In other words, a judge of the Botswana Industrial Court is not required to have any specialist knowledge of labour law. Like many of the other jurisdictions, the Botswana Industrial Court Judge is required to sit with lay members (Assessors) who have industrial relations experience.

#### 4.2 (ii) Legal Representation

In some jurisdictions, (eg New Zealand and Great Britain) legal representation is allowed at all stages<sup>92</sup>. In South Africa sections 135 (4) and 140 of the LRA generally prohibit legal representation in dismissal cases for conciliation and arbitration.<sup>93</sup> Legal representation is only allowed if;

- (a) the commissioner and *all* other parties consent (section 140 (1) (a); or
- (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation.<sup>94</sup>

Factors which should assist a commissioner decide in determining the need for legal representation include, the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest and the comparative

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<sup>90</sup> Section 17 (3), *Trade Disputes Act* as read with section 96 (3), *Constitution of Botswana*

<sup>91</sup> Section 96 (3), *Constitution of Botswana*, op.cit.

<sup>92</sup> Corby S. & Newall I, op. cit at 7

<sup>93</sup> Section 135(4) & 140, *1995 SA LRA*, op. cit.

<sup>94</sup> Section 140 (1) (b) (i)-(iv), *1995 SA LRA*, op. cit

ability of the opposing parties or their representatives to deal with the arbitration of the dispute.<sup>95</sup> The primary rationale behind this approach is to decrease the number of technical arguments that come before the arbitrator/adjudicator. It is often argued that legal representatives tend to adopt legal procedures that are technical and complex in nature.

The Trade Disputes (Amendment) Act of 1992 generally allows for an individual to be represented by a person of his/her own choice. Section 21 of the TDA provides that 'Any interested party in any proceedings under this Act may appear by advocate or be represented by any other person so authorized by such party.'<sup>96</sup> In drafting this section, it is evident that the legislature was attempting to balance the right of legal representation with a certain degree of informality suitable for a dispute resolution institution.

#### 4.3 Formality: Adversarial vs Investigative/Inquisitorial approach

The degree of formality of the dispute resolution system will also depend on whether the approach adopted in the system is an adversarial or investigative/inquisitorial one.<sup>97</sup>

An adversarial system 'places the onus of collecting and presenting evidence on the parties who have to prove or dispute facts upon which the claim is based.'<sup>98</sup> In the United Kingdom, much of the Industrial Tribunals failure to achieve its

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<sup>95</sup> Ibid

<sup>96</sup> Section 21, *Trade Disputes Act*, op. cit.

<sup>97</sup> Clark *Arbitration in Dismissal Disputes in South Africa and the UK*, (1997) 18 ILJ 609

<sup>98</sup> Corby S. & Newall I., op. cit. at 7